109-90

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~268.~~ ~~3~~ 10.

AUGUSTUS LAVER, APPELLANT,

vs.

ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, COPARTNERS UNDER THE NAME AND STYLE OF ROBERT DENNETT & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 27, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 268.

AUGUSTUS LAVER, APPELLANT,

vs.

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a UNITED STATES OF AMERICA, *ss:*

To Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Co., defendants in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1879, pursuant to an order granting an appeal to the Supreme Court of the United States, made by the circuit court of the United States
b for the district of California in the suit therein entitled Augustus Laver versus Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Co., wherein said Augustus Laver is complainant and appellant and the said Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Co., are defendants and appellees, to show cause, if any there be, why the decree mentioned in the said order granting an appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 6th day of
c September, A. D. 1879, and of the Independence of the United States the 104th.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

d (Indorsed:) No. 1422. U. S. circuit court, dist. of Cal. A. Laver vs. Robt. Dennett et al. Citation.

Service of a copy of the within citation admitted this 9th day of September, A. D. 1879.

STETSON & HOUGHTON,
Solicitors for Appelle's.

Filed Sept. 9th, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.
In equity.

The President of the United States of America, greeting, to Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Co.:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of October, A. D. 1875, to answer a bill of complaint exhibited against you in said court by Augustus Laver,
2 who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 100th.

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

Memorandum pursuant to rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of October next, at the clerk's
3 office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

(Endorsed:)

OFFICE U. S. MARSHAL,
Dist. of California, ss:

I hereby certify that I received the within s'p'a in equity on the 11th day of Sept'r, 1875, and on the same day I personally served the same on Barstom, Stetson and Houghton, at the city & county of San Francisco, in this district, by delivering to and leaving with Edward Gray Stetson, one of the members of said firm, personally a true copy of this subpœna, to which were attached a true and certified copy of the bill of complaint and a true and certified copy of an order to show cause & affidavit.

San Francisco, Sept'r 11, 1875.

E. P. MARSELLUS,
U. S. Marshal,
By C. H. MEAD, *Deputy.*

4 (Endorsed:) Filed 11th Sept'r, 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

5 *Bill of complaint.*

In the circuit court of the United States, ninth circuit, in and for the district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, copartners under the name & style of Robert Dennett & Co., defendants.

To the honorable the judges of the circuit court of the United States for the district of California:

Augustus Laver, of San Francisco, California, and a citizen of the State of California, brings this his bill against Robert Dennett, Colton Maw, and Frederick Ingle, of London, England, and subjects of
6 Her Majesty Victoria, Queen of Great Britain and *Britain and* Ireland. And thereupon your orator complains and says:

I. That your orator, the complainant, is a citizen of the State of Cal-

ifornia, and that the aforenamed defendants are subjects of Her Majesty Victoria, Queen of Great Britain and Ireland.

II. That at all times herein mentioned the said defendants were and they still are partners, transacting business under the copartnership name and style of Robert Dennett & Co., and that all the transactions hereinafter alleged were had and entered into by said defendants as such partners.

III. That heretofore, to wit, in the month of , A. D. 1870, at the city of New York, in the State of New York, the said defendants, representing that they, as partners aforesaid, were the owners of a certain valuable invention (more particularly described in Exhibit A,
7 hereto annexed), covered and protected by letters patent issued by the Government of the United States, verbally contracted and agreed with complainant to forthwith grant and convey to him and his assigns, by a good and sufficient instrument in writing, the sole and exclusive right and authority to make, use, and sell, and vend to others to be so made, used, and sold, the said valuable invention for and throughout the United States of America for and during a period from thenceforth to the 13th day of August, A. D. 1880. That in return for such grant and conveyance, and in consideration thereof, the complainant on his part should, at the time of and in the same instrument with the said grant and conveyance, covenant and agree to pay to the defendants, as a royalty for the use of and as part proceeds of the sale of the said valuable invention for and during the period aforesaid, the certain sums of money stated, and as stated in the said Exhibit A,
8 which your orator prays may be deemed and taken as a part of this bill of complaint.

IV. That in consideration of the premises the said defendants then and there further undertook and agreed with the complainant to prepare and cause to be prepared the said good and sufficient instrument in writing, whereby they, the said defendants, should grant and convey to the complainant in consideration of the said sums of money to be so paid as aforesaid the sole and exclusive right and authority to make, use, and sell, and vend to others to be so made, used, and sold, the said valuable invention for and throughout the United States for and during the period aforesaid, as was agreed should be done as aforesaid, and wherein the complainant should covenant and agree to pay the said sums of money as stated in said Exhibit A as aforesaid.

V. That thereafter, to wit, on or about the 7th day of November, A. D. 1870, at the city of Albany, in the State of New York, the said defend-
9 ants, purporting and pretending to be acting in accordance with their last said undertaking and agreement, brought to the complainant the certain written contract or indenture prepared by them (whereof said Exhibit A is a true copy), and then and there falsely represented to the complainant that the same was the aforesaid good and sufficient instrument in writing, and that it granted and conveyed and purported to grant and convey to complainant the sole and exclusive right and authority to make, use, and sell, and vend to others to be so made, used, and sold, the said valuable invention throughout the district aforesaid for the term and period aforesaid, and in consideration of the moneys so to be paid as aforesaid, and then and there delivered the same to complainant, and asked and requested the complainant to execute and deliver to them a counterpart thereof, which defendants had prepared and then presented to complainant; that
10 complainant, trusting wholly to the defendants to prepare the said good and sufficient instrument in writing of said grant and

conveyance of said invention as aforesaid, and relying solely upon the said representations of said defendants of and concerning the said written contract or indenture and the contents and true construction thereof as aforesaid, and fully believing the same, thereupon received and accepted the said written contract or indenture so prepared, executed, and delivered by defendants as aforesaid, and in return executed and delivered to defendants the said counterpart thereof, and which said counterpart was in all respects similar to that executed by defendants as aforesaid in that it was signed by this complainant only. That at or before the execution of said indenture or counterpart by complainant as aforesaid he did not critically or carefully examine the same, but fully believing the said representations of defendants
11 as to its contents and construction, and that it clearly granted and conveyed to complainant the said sole and exclusive right and authority to make, use, and sell, and vend it to others to be so made, used, and sold, the said invention throughout the district and during the period aforesaid, as represented by defendants as aforesaid, he wholly relied on said representations in executing said indenture or counterpart as aforesaid. That without said belief, or had he believed or suspected that said representations of defendants were false or untrue, or that said indenture or counterpart did not grant or convey to complainant the said sole and exclusive right and authority to and over the said invention for the period and throughout the district aforesaid, he would not have received or accepted, executed or delivered, the same, or covenanted or agreed to pay the defendants the sums of money set forth in said indenture, or
12 any sum of money or thing whatever.

VI. That complainant is by his legal counsel advised, and, being so advised, believes, and, believing, avers, that the said indenture (Exhibit A hereto annexed) did not and does not contain a grant or conveyance of, or grant or convey or purport to grant or convey to complainant, the sole or exclusive right or authority to make, use, or sell, or to vend to others to be so made, used, or sold, the said invention for or throughout any district or for or during any period whatever. And the complainant says that the said indenture so executed by him as aforesaid was so executed by mistake on his part and through and because of the said false and fraudulent representations of the defendants, and is not in right or equity the agreement, contract, or covenant of complainant.

VII. That in about the month of , A. D. 1873, the complainant was, by his counsel learned in the law, advised (and then
13 first learned or knew) of the said defect in the said indenture, and that it did not grant or convey, or purport to grant or convey, to complainant the said sole and exclusive right or authority to or over the said invention for the period or throughout the district aforesaid; and that until so advised the complainant fully believed that said indenture granted and conveyed to him the said sole and exclusive right and authority to and over the said invention, as was represented to him by defendants as aforesaid; that thereupon the complainant notified in writing the said defendants of the said defect in said indenture, and of its failure to grant or convey to complainant the said sole or exclusive right or authority to or over the said invention as aforesaid; and then and thereafter, to wit, in the month of November, A. D. 1873, in writing, notified the defendants in England that he, this complainant, be-
14 cause of the said defect in said indenture, and the said false representations of said defendants concerning the same, surrendered

the said invention and indenture and all his rights thereto or thereunder to the defendants; and that defendants did not then or at any other time execute or deliver to complainant any other agreement or indenture concerning or relating to the said invention, or granting or conveying the same to complainant, as was agreed should be done as aforesaid.

VIII. That prior to the discovery of the said defect in said indenture, and of the said false representations of defendant, as aforesaid, and in accordance with his supposed agreement so to do, the complainant endeavored to introduce the said invention in divers places within the United States, and believing that he and his assigns had the sole and exclusive right so to do, there to make, use, and sell the said in-
15 vention and vend it to others to be so made, used, and sold; that he wholly failed in his said endeavors, and did not and could not sell, or vend to others to be made, used, or sold, the said invention in or for any part of the United States or elsewhere for or during any term or period whatever; and that he so failed by and because of said defect in said indenture, and because it did not grant or convey to the complainant or his assigns the sole or exclusive right or authority of so making, using, and selling, or vending to others to be so made, used, or sold, the said invention in or for the United States, or any part thereof, for or during any period, or at all; that the complainant has not received any money or other consideration whatever, directly or indirectly, from the said invention or from his said endeavors to sell and introduce the same, or from his said failure so to do, but, to
16 the contrary, has expended much time and labor and divers sums of money, aggregating the sum of three thousand dollars, in his said endeavors to introduce and sell the said invention as aforesaid, no part of which moneys has been repaid him by the said defendants.

IV. That heretofore, to wit, on the 12th day of October, A. D. 1874, the said defendants, subjects, &c., as aforesaid, instituted an action at law in the law side of this court (entitled "Robert Dennett et al. vs. Augustus Laver," & numbered 1298 therein) against this complainant, citizen, &c., as aforesaid, wherein the said defendants (then the plaintiffs) allege this complainant (there the defendant) to be indebted to them in the aggregate sum of three thousand pounds sterling (£3,000), with interest, upon the aforesaid indenture and counterpart (a copy whereof is attached to the complaint in said action and made a part thereof), and wherein the said defendants (then the plaintiffs) demand
17 judgment against this complainant (then the defendant) for the said sum of three thousand pounds sterling, with interest and costs of action; that said action is and is therein alleged to be based wholly upon the aforesaid indenture and counterpart, and the legal liability by the terms thereof imposed upon this complainant.

That process has been duly issued in said action and served upon this complainant as defendant therein; and that said action is still pending in said court and without issue yet being joined therein. That your orator, this complainant, has no adequate defense at law to the said action, but believes and avers that he has a full and perfect defense in equity to the same, as hereinbefore alleged.

Wherefore your orator prays this honorable court:

First. That this court order, adjudge, and decree that the afore-
18 said indenture and counterpart to, executed by this complainant by mistake on his part and through and because of the said false and fraudulent representations of the said defendants as aforesaid, be

brought here into court for cancellation, and that the same be thereupon cancelled.

Second. That this honorable court may also stay perpetually and enjoin, and by its decree herein cause to be perpetually stayed and enjoined, from further proceeding therein the aforesaid action at law so instituted in this court by said defendants and yet pending therein as aforesaid; and that said defendants, their agents and attorneys, be so ordered and restrained from the further prosecution of their said action at law forever.

Third. That until the final hearing and determination of this
19 cause, and during the pendency thereof, the said action at law be stayed and the plaintiffs therein, their agents and attorneys, restrained and enjoined from further proceeding therein.

Fourth. That this honorable court may be pleased to grant such other and further relief in the premises as the circumstances of this case may warrant, and shall appear meet and proper to this court.

Fifth. And your orator further prays that it may please your honors to grant unto him a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Robert Dennett, Colton Maw, and Frederick Ingle, copartners and defendants as aforesaid, commanding them on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court then and there to answer all and singular
20 the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator, as in duty bound, will ever pray, &c.

Dated San Francisco, September 3d, 1875.

PIXLEY & HARRISON,
Solicitors for Complainant.

ROBT. HARRISON,
Of Counsel.

UNITED STATES OF AMERICA,
District of California, ss:

Augustus Laver, being duly sworn, deposes and says that he is the complainant in the above-entitled cause; that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge except the matters therein stated on his in-
21 formation and belief, and as to those matters that he believes it to be true.

AUGUSTUS LAVER.

Sworn to and subscribed before me this 3rd day of September, 1875.

JOS. F. O'BEIRNE,
Comm'r U. S. Cir. Ct., Cal.

Exhibit A: Annexed to the foregoing bill and made part thereof.

Whereas certain letters patent of the United States, bearing date the 4th day of January, 1870, numbered 98571, were granted to Charles Colton Dennett, of Nottingham, England, for the term of seventeen years from the 13th day of August, 1863, for an improvement in the construction of concrete arches for building;

And whereas the said letters patent have been duly assigned by the said patentee, by his indenture dated April 30, 1870, and recorded in the United States Patent Office, August, 1870, to Robert Den-

22 nett, Colton Maw, and Frederick Ingle, doing business at said Nottingham and at London, England, under the firm name of Robert Dennett & Co.;

And whereas Augustus Laver, architect of Albany, New York, is desirous of obtaining a license to make, use, and sell the said invention within the United States, under the patent, rent, or royalty and the terms and conditions hereinafter mentioned:

Now this indenture witnesseth that the said Robert Dennett & Co., for and in consideration of the covenants and agreements hereinafter contained, and to be kept and performed by said Augustus Laver, his representatives and assigns, have given and granted, and by these presents do give and grant, unto the said Augustus Laver, his executors, administrators, and assigns, during the residue of the unex-
23 pired term of said letters patent, full and free liberty, license, and authority to make, use, and sell, or vend to others to be sold, the said invention within the divisions of the United States, as hereinafter specified, or one or more of them, in the manner and according to the provisions and agreements hereinafter contained, and upon the payment of the sums of money as herein provided, and not otherwise.

First. The said Augustus Laver, for himself, his executors, administrators, and assigns, covenants and agrees to pay to said Robert Dennett & Co., their executors, administrators, and assigns, or to their authorized attorney, as patent fee or royalty, the sum of ten shillings sterling, English, per "square," of one hundred square feet, superficial measure, upon all work made, or caused to be made, by or for him, or under his authority, license, or permission, under or according to
24 said patent, or containing or using said invention or any part thereof.

Second. For the purposes of this license the said parties hereby divide the whole United States into four divisions, whereof the State of New York constitutes division A; the six New England States and New Jersey constitute division B; Pennsylvania, Ohio, Maryland, Virginia, Delaware, West Virginia, and the District of Columbia constitute division C; the rest of the United States constitutes division D.

Third. The said Augustus Laver agrees to commence immediately to work the said invention in division A, and to pay said licensers every three months, as hereinafter provided, the said patent fee or royalty, of ten shillings sterling per "square" on all "squares" of work, laid or made according to said patent, previous to September 30, 1872, be the same more or less; after which date the said Laver shall pay to said licensers for royalties on account of said division A,
25 annually in equal quarterly payments, at least five hundred pounds sterling, equal to the amount of such royalty upon one thousand "squares" of work, which sum of £500 sterling is hereby declared to be the minimum amount of annual royalties which shall be due and payable from and by said Laver, his representatives and assigns, to the said licensers for the right to use said invention in division A after said 30th September, 1872, and if said Laver, or his representatives or assigns, shall make or use more than 1,000 "squares" during any year following said 30th September, 1872, in said division A then he and they shall pay such royalty of ten shillings sterling per "square" on the excess until the whole amount so paid on account of said division A shall amount to one thousand pounds sterling, which sum is hereby declared to be the maximum amount of royalties required to be paid in any one year for said division.

26 Fourth. The said Augustus Laver hereby further agrees to use

his utmost diligence, from the date hereof, to introduce and work said invention in each of the three other divisions B, C, & D, and before the times limited for the accruing of the maximum and minimum amounts of royalties therein, as herein next provided, and all work done therein, be the same more or less, previous to times of such limitation shall be chargeable with said royalty of ten shillings sterling per "square," payable every three months, as hereinafter provided, without regard to the annual amount thereof.

Fifth. The said maximum and minimum royalty shall begin to accrue against division B from the 30th September, 1872; against division C from the 30th March, 1873; and against division D from the 30th
27 day of March, 1874, from and after which days respectively there shall become due and payable to said licensers the minimum amounts of £500 sterling annually for each of said divisions, together with the royalties on all work done in said divisions respectively over and above the minimum of one thousand "squares" for each division until the said maximum of one thousand pounds sterling of annual royalties on account of each of the said divisions shall have been paid to the said licensers.

Sixth. The said Augustus Laver has the privilege of surrendering this license with respect to said divisions A and B, or either of them, at any time prior to the 30th day of September, 1872, by serving upon the licensers in England a written notice to that effect at least six months before that day, and if he shall fail to give such notice of surrender on or before the 30th of March, 1872, then this license,
28 with respect to divisions A and B, shall stand, and the said maximum and minimum amounts of royalty, as above provided, shall become due and payable annually on account of said divisions A and B during the residue of the term of said patent. And the said Laver shall have the like privilege of surrendering either of said other divisions C or D by giving said Robert Dennett & Co., in England, written notice of his desire to surrender said license as to either of said divisions C or D, providing such notice shall be served at least six months before the said times, 30th March, 1873, and 30th March, 1874, which are set respectively for the accruing of said maximum and minimum amounts of royalty therein, and upon said Laver failing to give such written notice in manner aforesaid, then this license, with respect to said divisions C and D, shall stand, and the said maximum and
29 minimum amounts of royalty shall accrue and be payable for each of them during the life of said patent.

Seventh. The royalties herein mentioned shall be paid quarter yearly, and the said licensee, his representatives and assigns, shall render an account every three months of the work done under this license in each of said divisions during the preceding three months, both as to locality, area, and date of execution, which accounts shall be verified under oath by him or them, or by such of his or their employees as shall have the best knowledge of the amount of work done, and shall pay the royalties on all such work within three months thereafter.

Eighth. The said Augustus Laver also covenants and agrees for himself, his executors, administrators, and assigns, to keep full and correct books of account of any and all work which he or they may
30 manufacture, or cause or authorize to be manufactured, containing or using the said invention, which said books of account shall be opened at all reasonable times to the inspection of said Robert Dennett & Co. and their representatives or their attorneys.

Ninth. All work containing or using said invention executed in any

of said divisions prior to the times limited for the accruing of said maximum and minimum amounts of royalty therein respectively shall be chargeable with royalty at the rate of ten shillings per "square," according to the amount of work, without limitation of maximum or minimum, and accounts shall be rendered thereof quarterly, and said royalty shall be paid thereon within three months thereafter.

Tenth. The said Augustus Laver may surrender this license at any time upon giving six months prior notice to the said Robert Dennett & Co. in England.

31 Eleventh. The said Augustus Laver hereby further covenants and agrees for himself, his executors, administrators, and assigns, that he and they, at all the times from the date hereof, both before and after the minimum royalty begins to accrue, will use all reasonable diligence in introducing and working the said invention in all the said divisions of the United States, and will advertise the same by circulars and by other usual methods, and will not work said invention otherwise than is described in said patent, and that they will do nothing to prejudice the interests of the said Robert Dennett & Co.; and further that to all titles, statements, designations, or advertisements of this work in the United States the said Augustus Laver, his representatives and assigns, will affix the words and figures:

"Dennett's patent; patented January 4, 1870."

32 Twelfth. Upon the failure of said Augustus Laver, his executors, administrators, or assigns, at any time to faithfully carry out and perform any or either of the said herein contained covenants and provisions on their part to be performed, the said Robert Dennett & Co., their representatives or assigns, may revoke and annul this license as to either of said divisions, first giving said Augustus Laver thirty days' notice thereof; in which case this license and all the rights and privileges hereunder shall forever cease and determine.

Thirteenth. The previous agreements and covenants of this indenture shall apply to and bind the representatives, successors, and assigns of the said parties hereto respectively.

Fourteenth. It is hereby further mutually agreed that in case of any disagreement relating to this license such disagreement shall be

33 submitted to arbitration, and each party shall, within twenty days after notice from the other party, designate one arbitrator, and the two thus elected shall determine the questions of disagreement, and if they shall be unable to concur in a decision they shall choose a third person, who shall act as umpire in the premises, and his decision shall be final and binding upon all parties hereto, and shall be made a rule of Her Britannic Majesty's court of exchequer and of the circuit court of the United States for the southern district of New York.

In witness whereof the parties hereto have hereunto set their hands and seals this second day of November, 1870.

ROB'T DENNETT & CO. [SEAL.]

In presence of—
JAMES E. CHANDLER,
J. VAN SANTWOOD,
As to Robert Dennett & Co.

34 STATE OF NEW YORK,
City & County of New York, ss:

I do hereby certify that on this second day of November, 1870, before me, a notary public in and for said county of New York, personally came Frederick Ingle, to me known to be the person described in the

foregoing indenture as one of the firm of Rob't Dennett & Co. in said indenture mentioned, and who subscribed the name of said firm to the said indenture, and he acknowledged that he executed the said indenture as the act of said firm.

[NOTARY'S SEAL.] JAMES E. CHANDLER,
Notary Public, N. Y. County.

(Endorsed:) Filed 3rd Sept'r, 1875. L. S. B. Sawyer, clerk, by J. F.

35 *Answer.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
v.
ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, copartners, etc., defendants. } In equity.

The joint and several answer of Robert Dennett, Colton Maw, and Frederick Ingle, defendants, to the bill of complaint of Augustus Lever, complainant.

These defendants, reserving to themselves all right of exception to the said bill of complaint, severally answering the same, say:

They admit that the complainant is a citizen of the State of California, and that the defendants are subjects of Her Majesty Victo-
36 ria, the Queen of Great Britain and Ireland, and that at all the times mentioned in the said bill of complaint the defendants were and still are partners transacting business under the copartnership name and style of Robert Dennett & Co., and that all the transactions alleged in the bill as having been had and entered into by the defendants were had and entered into by them as such partners, except so far as defendants hereinafter deny that such transactions were had or entered into at all.

Defendants admit that in the year 1870, at the city of New York, in the State of New York, they represented that they, as partners as aforesaid, were the owners of the valuable invention described in the bill of complaint, but deny that they did then or ever verbally contract or agree with the complainant to grant or convey forthwith or otherwise to him or his assigns, by a good and sufficient or any in-
37 strument in writing or in any manner, the sole or exclusive right or authority to make, use, or sell, or vend to others to be so made, used, or sold, the said valuable invention for or throughout the United States of America or anywhere during any period whatsoever; or that they then or ever verbally agreed with complainant that in return for such grant or conveyance, or in consideration thereof, the complainant on his part should at the time of or in the same instrument with the said grant or conveyance covenant or agree to pay to the defendants as a royalty *as a royalty* for the use of or as part proceeds of the sale of the said valuable invention, or otherwise for or during any period of time whatsoever, the sums of money stated, or as stated in Exhibit A (referred to in said bill), or any sums of money whatever, or that defendants, in consideration of the premises or otherwise, there or then or at all undertook or agreed with the complainant to prepare,
38 or cause to be prepared, the said good and sufficient instrument in writing, whereby they, the said defendants, should grant or convey to the complainant, in consideration of the sums of money to be

paid as aforesaid, the sole or exclusive right or authority to make, use, or sell, or vend to others to be so made, used, or sold, the said valuable invention for or throughout the United States or anywhere for any period whatever, or that it was ever agreed that the same should be done; or that in such instrument in writing the complainant should covenant or agree to pay the said sums of money as stated in said Exhibit A.

Defendants admit that thereafter, to wit, on or about the 7th day of November, A. D. 1870, they caused to be prepared the certain written contract or indenture, of which said Exhibit A is a true copy,
39 but deny that they, or any of them, then or ever carried the same to the complainant at the city of Albany or anywhere, or that they purported or pretended to be acting in accordance with the previous verbal undertaking or agreement alleged in the bill, or that defendants, or any of them, then or there or at any time or place falsely or in any manner represented to the complainant that the same was the good and sufficient instrument in writing which, according to the said alleged verbal agreement, defendants were to prepare, or that it granted or conveyed, or purported to grant or convey, to complainant the sole or exclusive right or authority to make, use, or sell, or vend to others to be so made, used, or sold, the said valuable invention throughout the district aforesaid or anywhere for the period aforesaid, or for any period, in consideration of the moneys so to be paid as aforesaid, or for any consideration, or that defendants, or any of them, made any representations about said indenture at all.

40 Defendants admit that on or about the said 7th day of November, A. D. 1870, viz, on the 2d day of November, they executed the said indenture, and on or about the 20th day of that month delivered the same to complainant, but deny that they ever asked or requested complainant to execute or deliver to them any counterpart thereof except as hereinafter set forth.

Defendants admit that the complainant received and accepted the said indenture when delivered by defendants as aforesaid, and that complainant executed and delivered to them a counterpart thereof, but deny that he did so trusting wholly or at all to the defendants to prepare the good and sufficient instrument in writing of said grant and conveyance of said invention as aforesaid, or that he did so relying wholly or at all upon the aforesaid alleged or any representations of the defendants of or concerning the said written
41 contract or indenture or the contents and true construction thereof, or that he did so fully believing such alleged representations, or that he did so "in return" or at all except as hereinafter set forth, and they admit that the said counterpart was in all respects similar to the indenture executed by defendants as aforesaid, save in that the said counterpart was signed by the complainant only, and is dated the 2nd day of November, 1870, instead of the 7th day of that month.

And defendants, on their information and belief, deny that at or before the execution of the said counterpart by complainant he did not critically or carefully examine the same, or that in executing the same he relied wholly on or believed fully or otherwise that said alleged representations, or any representations of defendants or any of them, as to its contents and construction, or that it clearly granted or conveyed to complainant the said or any sole or exclusive right or author-
42 ity to make, use, or sell or vend to others to be so made, used or sold, the said invention throughout the district or during the period aforesaid; or that defendants or any of them made any repre-

sentations whatever to complainant as to the contents or construction of said counterpart or indenture. But defendants believe it to be true that complainant believed, at the time he executed the said counterpart, that it and the said indenture clearly granted and conveyed to complainant the sole and exclusive right and authority to make, use, and sell the said invention, and to vend it to others to be sold, throughout the district and during the period aforesaid, but do not know the same of their own knowledge.

And, further answering, defendants say that they, or any of them to the knowledge or belief of the others or either of them, do not know, and have never been informed save by the complainant's said bill and by letters from him, whether the complainant, without said belief,
43 or had he believed or suspected that said indenture and counterpart did not grant or convey to him the said sole and exclusive right and authority to and over the said invention for the period and throughout the district aforesaid, would not have received or accepted, executed or delivered, the same, or covenanted or agreed to pay the defendants the sums of money set forth in said indenture, or any sum of money or thing whatever, and cannot answer as to their belief or otherwise respecting the same, but leave the complainant to make such proof thereof as he shall be advised is material.

Defendants admit that the said indenture did not, and does not, contain a grant or conveyance of, or grant or convey, or purport to grant or convey to complainant, the sole or exclusive right or authority to make, use or sell, or to vend to others to be so made, used, or
44 sold, the said invention for or throughout any district, or for or during any period whatever. But they and each of them deny that the said indenture so executed by complainant, as aforesaid, was so executed through or because of the said or any false or fraudulent representations of the defendants or any of them, or that the same is not in right or equity the agreement, contract, or covenant of the complainant. But defendants believe it to be true that said indenture was executed by mistake on the part of complainant, in that he believed at the time he executed it that it would operate in law to give him exclusive rights, as aforesaid, but they deny, on information and belief, that he executed it by or under any other mistake.

Defendants admit that in the year 1873 the complainant was, by his counsel learned in the law, advised of the said defect in the said indenture, and that it did not grant or convey, or purport to grant
45 or convey, to complainant the said sole or exclusive right or authority to or over the said invention for the period or throughout the district aforesaid. But they severally say that they or any of them to the knowledge or belief of the others or either of them do not know and were never informed except by complainant long after the execution of said indenture, and cannot set forth as to their belief or otherwise whether complainant first learned of such defect in said indenture at some time in the year 1873, or whether until so advised as aforesaid, the complainant fully believed that said indenture granted and conveyed to him the said sole and exclusive right and authority to and over the said invention, but they leave complainant to make such proof thereof as he may be advised is material.

Defendants admit that at some time in the year 1873, the complainant notified them in writing of the said defect in said indenture,
46 and of its failure to grant or convey to complainant the said sole or exclusive right or authority to or over the said invention, but they and each of them deny that then or thereafter in the month of

November, A. D. 1873, or at any time, the complainant notified the defendants in writing or otherwise in England or anywhere else, that the complainant because of the said defect in said indenture or the said alleged false representations of said defendants concerning the same, or for any reason surrendered the said invention or indenture or all his rights thereto or thereunder to these defendants, or that he surrendered the same at all.

And defendants admit that they did not then or ever execute or deliver to complainant any other agreement or indenture concerning or relating to the said invention or granting or conveying the same to complainant, but they deny that it was ever agreed between them
47 and the complainant that any other agreement or indenture should be so executed or delivered.

And further answering defendants severally say, that they or any of them to the knowledge or belief of the others or either of them, do not know and have never been informed save by complainant's said bill and by letters from him, and cannot set forth as to their belief or otherwise whether prior to the discovery of the said defect in said indenture and of the alleged false representations mentioned in the bill, the complainant endeavored to introduce the said invention in divers places within the United States, or whether he endeavored there to make, use, or sell the said invention, or vend it to others to be so made, used, or sold, or whether he then believed that he and his assigns had the sole and exclusive right to do so, or whether he wholly failed in his said endeavors and did not sell or vend to others to be made,
48 used, or sold the said invention in or for any part of the United States or elsewhere, for or during any period whatever, and they leave the complainant to make such proof thereof as he may be advised is material. But they admit that he endeavored to sell the patent right for a certain territory, to wit, the New England States.

Defendants deny on their information and belief that complainant could not sell or vend to others to be sold the said invention in or for any part of the United States or elsewhere for or during any term or period whatsoever, or that he failed to do so because of said defect or any defect in said indenture, or because it did not grant or convey to the complainant or his assigns the sole or exclusive right or authority of so making, using, or selling, or vending to others to be so made, used, or sold the said invention in or for the United States or any part thereof, for or during any period or at all.

49 And further answering defendants say that they or any of them to the knowledge or belief of the others or either of them, do not know and have never been informed save by statements of the complainant, and cannot set forth as to their belief or otherwise, whether complainant has ever received any money or other consideration directly or indirectly from the said invention, or from his said endeavors to sell and introduce the same, or from his said failure so to do, or whether he has expended much time or labor or $3,000 in money in his said endeavors to introduce and sell the said invention as aforesaid, and they leave the complainant to make such proof thereof as he may be advised is material. But they believe it to be true that complainant did expend some time and labor and some money in his said endeavors, and they admit that no part of such money has ever been repaid to him by the defendants.

50 Defendants admit that heretofore, to wit, on the 12th day of October, A. D. 1874, the defendants instituted an action at law on the law side of this court (entitled "Robert Dennett et al. vs Au-

gustus Laver," and numbered 1298 therein) against the complainant wherein the said defendants (there the plaintiffs) allege the complainant (there the defendant) to be indebted to them in the aggregate sum of three thousand pounds sterling (3,000£) with interest upon the aforesaid indenture and counterpart (a copy whereof is attached to the complaint in said action, and made a part thereof) and wherein the said defendants (there the plaintiffs) demand judgment against the complainant (there the defendant) for the said sum of three thousand pounds sterling with interest and costs of action. And that said action is, and is therein alleged to be based, wholly upon the aforesaid
51 indenture and counterpart and the legal liability by the terms thereof imposed upon the complainant, and that process has been duly issued in said action and served upon complainant as defendant therein, and that said action is still pending in this court and without issue yet being joined therein, and that complainant has no adequate defence at law to the said action. But defendants deny on their information and belief that he has any defence to the same in equity.

And further answering defendants say that early in the year 1870, they being then, as partners as aforesaid the owners of a patent for the United States of America for the invention aforesaid, the complainant went to England, and there entered into negotiations with the defendants in regard to purchasing certain rights under said patent and introducing said invention into the said United States, which negotiations were afterwards continued in the State of New York between
52 complainant and defendant Ingle acting for himself and his copartners the other defendants. That these negotiations continued till the month of October, A. D. 1870, without any agreement having been arrived at, when defendant Ingle being then in the city of New York aforesaid, and being on the point of returning to England, and wishing to bring the negotiation to a definite conclusion one way or the other, caused a draft of an agreement between said Dennett & Co. and complainant to be made, and sent the same to complainant who was then in the city of Albany, in the State of New York.

That this draft and the said indenture in all portions of them which bore in any way on the question of granting exclusive rights under the said patent or exclusive rights to sell the same were exactly alike word for word. That the complainant a few days afterwards returned
53 said draft to defendant Ingle, who was still in the city of New York, aforesaid, with certain alterations in it which he, complainant, had made, and with complainant's signature attached.

That defendant Ingle assenting to some of these alterations but being unwilling to assent to the rest of them, caused the said draft to be re-engrossed with those changes in it which had been made by complainant and assented to by defendant Ingle as aforesaid, and with no other alterations; and thereupon, to wit, on or about the 2d day of November, A. D. 1870, sent such re-engrossed draft as an ultimatum to complainant at Albany aforesaid for his signature or rejection, and at the same time defendant Ingle signed the said firm name of defendants to a duplicate of said draft (so re-engrossed), and deposited such duplicate with his solicitors in New York to be delivered to com-
54 plainant upon his, complainant's executing and delivering the re-engrossed draft which had been sent to him as aforesaid. That on the 2d day of November, A. D. 1870, defendant Ingle left New York for England, and after he had gone, to wit, on or about the 7th day of November, A. D. 1870, complainant duly executed and delivered to said solicitors for the defendants the re-engrossed draft which had been sent

to him as aforesaid, accompanied by a letter in which he expressed his satisfaction with the instrument as it then stood. That thereupon, to wit, on or about the 19th day of November, A. D. 1870, the said solicitors on behalf of the defendants and at complainant's special request, delivered to complainant the duplicate which had been signed with the firm name of defendants as aforesaid, and which is the original of said Exhibit A.

And further answering defendants say, that there never was any verbal agreement between them and complainant in reference
55 to said invention or the sale of the said patent, and that there never was any agreement whatever between them until the execution and delivery of said indenture and counterpart as aforesaid, which was and is to this day the only agreement of any kind in relation to said invention between defendants and complainant. That previous to the execution and delivery of said indenture and counterpart, there were preliminary negotiations between defendants and complainant extending over a period of several months as aforesaid, but no agreement was arrived at and the minds of the parties never met and no result was reached till the execution and delivery of said indenture and counterpart as aforesaid.

And further answering defendants say, that at the time of the execution and delivery of the said indenture and counterpart, they
56 supposed that the same was sufficient in law to vest in complainant the sole and exclusive right to make, use and sell, and vend to others to be sold, the said invention throughout the district and for the period aforesaid, and that they did not discover to the contrary till about the 1st day of May, A. D. 1873, and that so supposing they have always treated complainant's rights under the said indenture as exclusive throughout the United States, and have never themselves made or used the said invention within the United States, nor sold nor vended it to others to be sold within the United States except by said indenture, nor licensed any person or persons save the complainant to make or use the said invention within the United States, nor in any manner granted any rights under their said patent except such as were granted to complainant by the indenture aforesaid. And that since the execution and delivery of the said indenture and
57 counterpart and both before and since the discovery that said indenture did not convey exclusive rights, as aforesaid defendants have had a number of applications from divers persons to purchase of them divers rights and privileges under their said patent within the district and in the period aforesaid, but believing that in consequence of their agreement with complainant they had no power to grant such rights, they have always refused to do so, and have always referred such applicants to the complainant as the only person who could grant such rights and privileges. That by so doing and so abiding, as they supposed, by the true meaning of the said indenture, defendants have for more than five years, to wit, ever since said indenture was entered into, been deprived of all benefit and advantage from their said patent, which deprivation will be without remedy and an absolute loss to them unless they can hold the complainant liable
58 to them according to the terms of said indenture.

And further answering defendants say, on their information and belief, that during the spring of the year 1873, the complainant being in California, had made one Thomas Fuller, of Albany aforesaid, his agent, to transact his business in the Eastern States in connection with and arising out of said patent or indenture; and that, about the

1st day of May, A. D. 1873, defendants, being then in England, were informed by a letter from said Fuller, dated at Albany aforesaid, April 15th, 1873, that there was a defect in the said indenture, in that it was not sufficient in law to vest in complainant exclusive rights as aforesaid, and that it was necessary that complainant should have such exclusive rights in order to effect a sale of certain territorial rights under said patent, which sale was then in process of negotiation. That thereupon, and as soon as possible, to wit, on the 5th or 6th day of
59 May, A. D. 1873, defendants sent a telegraphic dispatch by ocean cable to said Fuller at Albany aforesaid, to the effect that they would amend the said indenture so that it should grant exclusive rights as aforesaid to complainant, and at the same time wrote him fully by mail to the same effect, and also wrote to their said solicitors in New York, instructing them to draw up, without delay, such an instrument or instruments as would effectually cure the said defect and vest in complainant exclusive rights as aforesaid. That, as defendants are informed and believe, such a curative instrument was drawn up by said solicitors and transmitted to complainant for his signature, but that complainant neglected to avail himself of it, and never did anything towards carrying into effect the proposed amendment of said indenture; and at length, to wit, on the 3rd day of November, A. D. 1873,
60 and the 5th day of March, A. D. 1874, refused to sign the curative instrument aforesaid, and refused to agree to any such amendment of the indenture as would cure the defect aforesaid.

And further answering defendants and each of them say, on their information and belief, that the complainant did not in good faith commence immediately upon the execution of said indenture to work the said invention, nor use his utmost nor reasonable diligence to introduce and work the same within the respective divisions of the United States, as provided by articles third and fourth of the said indenture, and that had he done so and prosecuted the enterprise with reasonable energy and business skill he would have worked the said invention in the United States with great success and profit, so as to produce for defendants a return much greater than the minimum royalties mentioned in said indenture.

61 And further answering, defendants and each of them say that they never made any representations fraudulent or otherwise to complainant as to the meaning or the true construction of said indenture, and that after the time when the first draft of the proposed indenture was sent as aforesaid to complainant, at Albany, they never saw him at all, nor did any of them, and that complainant had ample time and opportunity to examine said indenture, and satisfy himself as to the meaning and legal effect thereof before he executed it, and as defendants are informed and believe, he had read it and knew its contents at the time he signed it as aforesaid, and that the mistake, if any there was, on the part of the complainant as alleged in the said bill was a mistake of law as to the meaning and true construction of said indenture. That defendants have in good faith kept the covenants in
62 said indenture on their part to be kept and performed, and in every way complied with the provisions of the same as it was originally understood by them as aforesaid. That the defendants' said patent expires in the year 1880, and that even if they should now begin to introduce the said invention into the United States the same would hardly begin to be profitable before the patent would expire.

That the parties to the said indenture cannot now be restored to the

situation in which they were at the time the same was executed, and that complainant is in equity and justice bound by the same.

And further answering, defendants deny that the said complainant is entitled to the relief or any part thereof in the said bill prayed for. And defendants pray the same advantage of their aforesaid answer, as if they had pleaded or demurred to the said bill. And they pray
63 to be hence dismissed with their reasonable costs and charges in this behalf, most wrongfully sustained.

FREDERICK INGLE.
ROBERT DENNETT.
COLTON MAW.

Consulate General of the United States of America, at No. 53[a] Old Broad street, in the city of London, England.

Frederick Ingle, being duly sworn, deposes and says that he is one of the defendants named in the foregoing answer subscribed by him; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

FREDERICK INGLE.

Subscribed and sworn to this twenty-fifth day of April, A. D. 1876, before me.

64 I. NUNN, [SEAL.]
Vice and Deputy Consul-General and Notary Public, ex-officio of the United States at London, and a Commissioner to administer oaths in the Supreme Court of Judicature.

Robert Dennett, being duly sworn, deposes and says that he is one of the defendants named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and, except, also, as to those matters which are therein alleged to have taken place in the United States, and as to those matters he believes it to be true. That deponent was not in the United States during the time covered by said answer, and for that reason cannot swear positively to what took place there during that time.

65 ROBERT DENNETT.

Subscribed and sworn to this twenty-fifth day of April, 1876, before me,

I. NUNN, [SEAL.]
Vice and Deputy Consul-General and Notary Public, ex-officio of the United States at London, and a Commissioner to administer oaths in the Supreme Court of Judicature.

Colton Maw, being duly sworn, deposes and says that he is one of the defendants named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief; and except, also, as to those matters which are therein alleged to have taken place in the
66 United States; and as to those matters he believes it to be true;

that defendant was not in the United States during the time covered by said answer; and for that reason cannot swear positively to what took place there during that time.

COLTON MAW.

Subscribed and sworn to this twenty-seventh day of April, A. D., 1876, before me,

I. NUNN, [SEAL.]
Vice and Deputy Consul-General and Notary Public, ex-officio of the United States of America at London, and a Commissioner to administer oaths in the Supreme Court of Judicature.

(Endorsed:)
Service of a copy of the within answer this 6th day of July, 1876, is admitted.

PIXLEY & HARRISON,
Solicitors for Complainant.

Filed July 6th, 1876. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep. cl'k.

67 *Replication.*

Circuit court of the United States, ninth circuit, in and for the district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL., DEFENDANTS.

And now comes Augustus Laver, the complainant herein, and for his replication to the answers of the defendants herein says:

That he hereby joins issue with the said defendants, Robert Dennett, Colton Maw, and Frederick Ingle, and with the denials and averments of their said answers; and that, saving to himself the benefit and advantage of all exception to the insufficiencies of the said answers, he will aver, maintain, and prove his bill of complaint herein to be
68 true, certain and sufficient in law, and the said answers of said defendants to be untrue, uncertain, and insufficient in law or to be further replied unto.

PIXLEY & HARRISON,
Solicitors for Complainant.

AUG. LAVER
vs.
ROB'T DENNETT ET AL.

It is hereby stipulated that the foregoing replication may be filed herein nunc pro tunc as of August 7, 1876.

BARSTOW, STETSON & HOUGHTON,
Solicitors for Defendants.

San Francisco, Oct. 9, 1876.
(Endorsed:) Filed 10th October, 1876. L. S. B. Sawyer, clerk.

69 *Enrollment.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court room in the city of San Francisco, on Tuesday, the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

Present the honorable Lorenzo Sawyer, circuit judge.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, DEFENDANTS. } No. 1422.

The complainant herein filed his bill of complaint which is hereto annexed, on the 3d day of September, 1875.

Thereupon a subpœna to appear and answer herein was is-
70 sued, returnable on the first Monday of October, A. D. 1875, and service thereof made upon Messrs. Barstow, Stetson & Houghton, solicitors for defendants, as appears by the marshal's return endorsed upon said subpœna. Said subpœna is hereto annexed.

The defendants appeared herein by Messrs. Barstow, Stetson & Houghton, as their solicitors, and filed an answer to said bill of complaint on the 6th day of July, 1876. Said answer is hereto annexed.

On the 10th day of October, 1876, complainant filed his replication to said answer, which replication is hereto annexed.

Thereafter, said cause having come on for a final hearing, a final decree was filed and entered herein, which is hereto annexed, and is in the words and figures following, to wit:

71 *Decree.*

At a stated term of the circuit court of the United States of America for the district of California, held in the city and county of San Francisco, on the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-eight (1878.)

Present the honorable Lorenzo Sawyer, circuit judge.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, DEFENDANTS. } In equity. No. 1422.

This cause came on to be heard at this term of court, and was argued by counsel, and thereupon, upon consideration thereof, it
72 was ordered, adjudged, and decreed that the complainant's bill of complaint be, and the same hereby is dismissed, and that defendants have and recover from the complainant their costs in this suit, taxed at one hundred four $\frac{40}{100}$ dollars, and that they have execution therefor.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered June 18, 1878. L. S. B. Sawyer, clerk.

73 *Affidavit of A. F. Thane.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL. DEFENDANTS. } In equity. No. 1422.

UNITED STATES OF AMERICA,
District of California, ss:

Arthur F. Thane, being duly sworn, says, I am a clerk in the office of Messrs. Stetson & Houghton, solicitors for the defendants in this suit, and I reside in San Francisco, California. On the 22d day of June, A. D. 1878, I served the "memorandum of costs and disbursements" in this suit, together with the notice of settlement thereof (which memorandum and notice are attached hereto), on Messrs. Pixley & Harrison, the solicitors for the complainant in this suit, by
74 leaving a copy of the said memorandum and said notice in their office in said San Francisco with a person having charge thereof.

ARTHUR F. THANE.

Subscribed and sworn to this 22d day of June, A. D. 1878, before me.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, 9th Cir., Dist. Cal.

75 *Memorandum of costs and disbursements.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL., DEFENDANTS. } In equity. No. 1422.

Memorandum of costs and disbursements.

Clerk's fees	$52 40
Postage	2
Commissioner's fee } Consul's fee }	25 00
Solicitor's fee, $20; two dep'ns, $5	25
Total taxed at	$104 40

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep'y Clk.*

UNITED STATES OF AMERICA,
District of California, ss:

Edward Gray Stetson, being duly sworn, says that he is one of
76 *complainant's* solicitors in the above-entitled suit. That to the best of deponent's knowledge and belief the items in the above memorandum are correct, and the said disbursements have been necessarily incurred in said suit in gold coin.

EDW' GRAY STETSON.

Subscribed and sworn to this 20th day of June, before me.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

To Mr. ROBERT HARRISON,
Solicitor for Complainant:

SIR: Please take notice that on Tuesday, the 25th day of June, 1878, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we shall present the foregoing memorandum of defendants' costs and disbursements to the clerk of this court, at his office in San Fran-
77 cisco, and apply to him to have the same taxed.

Yours, &c.,

STETSON & HOUGHTON,
Defendants' Solicitors.

(Endorsed:) Filed 22 June, 1878. L. S. B. Sawyer, clerk.

78 *Certificate of clerk to enrolled papers.*

Whereupon said subpœna, pleadings, final decree, and taxed costs are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.,
[SEAL.]

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE, *Dep'y Clk.*

(Endorsed:) Enrolled papers. Filed 22 June, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y clerk.

79 *Deposition of Augustus Laver.*

In the circuit court of the United States, district of California.

AUGUSTUS LAVER
vs.
ROBERT DENNETT ET AL.

Be it remembered that on this twenty-sixth day of March, 1877, at my office, in the United States courts building in the city and county of San Francisco, State of California, before me, J. F. O'Beirne, a commissioner to take affidavits, &c., duly appointed by the circuit court of the United States for the ninth circuit and district of California, personally appeared AUGUSTUS LAVER, a witness on behalf of the complainant in the above-entitled action.

Robert Harrison, esquire, appeared as counsel for said com-
80 plainant, and Edward Gray Stetson, esquire, as counsel for the respondent.

And the said witness having been by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as follows, that is to say:

Examination-in-chief by Mr. HARRISON:

Q. 1. State your name, age, place of residence, and occupation.

A. Name, Augustus Laver; age, forty-five years; place of residence, San Francisco; occupation, architect.

Q. 2. You are the complainant in this cause?

A. Yes, sir.

Q. 3. State, as briefly as possible, your connection with the firm of Robert Dennett & Company, constituting the defendants in this cause and any negotiations which you had with them relating to the

81 patent-right described in Exhibit A in your complaint, and which were finally consummated by the contract set forth in the bill of complaint.

A. In 1868 my partner was architect of the New York State capital. In this connection I was consulted as to fire-proofing. I recommended the Dennett article as a safe and rigid fire-proofing, economical, and something new in the United States. This opinion resulted in a correspondence with the patentees, and an invitation was extended to inspect——

Q. 4. (Interrupting.) Just name who the patentees are.

A. Robert Dennett & Company; that is the name of the firm (continuing) to inspect works in Europe already executed.

Q. 5. You received an invitation from the patentees, Robert
82 Dennett & Company to inspect works in Europe where this patent was used?

A. Yes, sir. In 1870, about February 14th, I sailed for Europe, staying over two months, and satisfying myself as to the utility of the invention. About June Frederick Ingle, the negotiating partner in these transactions, arrived in the United States. Subsequently while staying at my house a proposition was made and a verbal agreement entertained by me for working the patent and having exclusive power to sell.

Q. 6. A verbal agreement or verbal proposition?

A. A verbal proposition. It was agreed between us; a verbal proposition, perhaps, would be better. This was supposed to be embodied in a document drawn up by Messrs. Van Santvoort & Hauff, lawyers of New York and legal advisers of the patentees. The execution
83 of this agreement was done hurriedly. Being strongly urged by the patentees' lawyers in New York, the documents were by them forwarded to me at Albany and sent back by return mail. I wholly trusted to the defendants being on friendly terms with them, and I do not believe that apparent fraudulent motives were really intended.

Q. 7. As you go along please state in general terms what that verbal understanding or agreement was, especially in regard to the question here at issue?

A. That I should have exclusive power to sell. I would not have taken it on any other terms.

Q. 8. Was there any other proposition made to you during the negotiations resulting in this written contract giving you any other power except that of an exclusive right?

A. There was; the power also to give licenses to those using it.

Question 8 repeated.

84 A. No. I consider that there was more than that.

Q. 9. I merely want to know whether you and Mr. Ingle had verbally agreed upon any other proposition except the right to an exclusive interest?

A. No other. I want it to be understood that there was more than a power to sell.

Q. 10. (Mr. STETSON.) Do I understand that there was no proposition entertained except for the exclusive right to sell?

A. No, sir; I could not have entertained any other.

Q. 11. (Mr. HARRISON.) You could not, or you would not?

A. I would not. There were many long conversations with reference to these points of which I am now speaking.

85 Q. 12. At, or prior to, the time of the execution of the contract

here in question did you present it to the inspection of any counsel or lawyer on your own behalf?

A. No, sir.

Q. 13. Did you know of any counsel being engaged excepting the counsel of the defendants, Van Santvoort & Hauff?

A. Not at the time. From the experience of subsequent events I have no doubt but that the mistake occurred consequent on the hurry of the transaction brought about by the urgent business necessities of Mr. Ingle and his desire to leave for Europe in the steamship China, then sailing from New York.

Q. 14. Simply recite the facts connected with the negotiations as they occurred—what you did, and what you heard Mr. Ingle state; what you supposed you were signing; what you supposed that
86 contract to be.

A. To give me exclusive power to sell. After Mr. Ingle had embarked and I had signed the agreement I at once began to work the patent by communicating with friends in the profession and otherwise. In the month of November, 1870, I was called to San Francisco on new City Hall matters, and was in February of the following year appointed its architect. In 1871 and 1872 I was engaged in building the new City Hall and making preparation in placing the iron beams and joists therein for the application of the patent as directed by the commissioners, and otherwise working for the introduction of the fire-proofing, publishing pamphlets with statistics and weights of beams for the use of the profession generally.

Q. 15. State what you did in the way of advancing this work—this agreement.

87 A. Not now being so well able to subserve the interests of the enterprise in the Eastern States, I gave a power of attorney to my partner, Mr. Fuller, in New York, after leaving for the Pacific States. In April, 1872, I first discovered a discrepancy in the agreement as to the price for division D, and as my letter on this subject shows, was even then in ignorance that I had an exclusive power to sell. In the fall of 1872, my partner in New York, under instruction from me conducted the sale of the six Eastern States to Colonel McKinn, for thirty thousand dollars, when his attorney first discovered that I had no power to sell. This led to correspondence and delay till the fall of 1873.

Q. 16. Correspondence with whom?

A. Correspondence with Dennett & Company. This led to cor-
88 respondence with Dennett & Company and delay till the fall of 1873, when the parties negotiating for the purchase, Messrs. McKinn declined to buy. They in the meantime, not being able to wait, had secured or decided on another patent. Up to this time everything possible was done by me at large cost, to introduce and sell the patent right. Upon receiving so severe a set back through the delinquencies, and the subsequent tardiness of the patentees, when they were discovered, no active part has been taken by me in the matter after endeavoring to effect the sale for Chicago on the 5th of May, 1873. My partner got resolutions passed by the new capitol commissioners at Albany in June, 1873, and could have sold the patent for the State of New York, but he declined further acting as my agent under the circumstances of Dennett & Company's irregularities.

Q. 17. What irregularities?

89 A. Irregularities in the agreement.

Q. 18. What irregularities do you refer to?

A. Having no power to sell.

Q. 19. Did Mr. Fuller refuse to negotiate the sale with these people in New York because you had no power to give them exclusive right?

A. Yes, sir; that is exactly it. All my experiments and Professor Craft's, with the report of the committee of the Architectural Association of Boston, on invention, consisting of Samuel F. Thayer, William R. Ware, A. C. Martin, W. F. Sears, and John A. Sturges, to whom the invention had been subjected by Mr. Fuller, acting on my behalf, have been printed and used by the patentees for advertisements in Europe

90 from which at my expense the owners of the Dennett arch have largely benefit'ed, thereby giving the system a more extensive introduction by leading architects who up to this time were inimical, and as I am informed on this evidence become convinced.

Mr. STETSON. Note an objection on the ground of irrelevancy to all that testimony which relates to the action of the patentees in Europe.

Q. 20. (Mr. HARRISON.) I understand you to say, Mr. Laver, that at your own cost and expense, you had the invention submitted to a board of architects of Boston, and the result of their inspection was a favorable report, which report you sent to the defendants in London, and which they had printed and used?

(Objected to as irrelevant.)

A. Yes, sir.

91 Q. 21. What other steps had you taken prior to the fall of 1873 to advance the interests of the patentees in this invention and to bring it into general use in the United States?

A. In various ways.

Q. 22. State, then, just what you did.

A. The patentees were satisfied and greatly pleased with my energy and all that I had done up to the time——

Q. 23. (Interrupting.) What did you do?

A. Up to this time, before the discrepancy in the agreement was discovered by McKinn's lawyers, I had been trying to effect the sale of the patent for the New England States, division B.

Q. 24. State in detail whatever you did, commencing at the

92 first step, and then running right along.

A. The first thing that I did I communicated with all my friends in the profession regarding its usefulness and advocating its use. I had pamphlets printed.

Q. 25. For what purpose? To set forth the invention—its usefulness?

A. Yes. This (producing) is the pamphlet referred to.

(The pamphlet last above referred to is offered in evidence by complainant's counsel, and marked Exhibit No. 1.)

Q. 26. State what other steps you took.

A. I had communication with Mr. McKinn, of Boston, regarding the fire-proofing.

Q. 27. For what purpose?

93 A. For the purpose of a sale of the Eastern States, part of division B.

Q. 28. For the purpose of selling him the right to use the invention?

A. For the purpose of the sale of the invention. I had a test made by Professor Craft, of Boston, the professor of chemistry in the Massachusetts Institute of Technology; a man of distinction in his profession.

(Complainant here offers in evidence "Report of Professor Craft, marked Exhibit No. 2."

The introduction of Exhibit No. 2 is objected to by respondents' counsel as incompetent and immaterial.)

Q. 29. What was the next thing done?

A. Then came the committee on invention of the Boston Society
94 of Architects. I got a committee to offer their opinion as to its merits or demerits. They gave a favorable opinion of it. These have been subsequently used by the patentees as advertisements.

(The last sentence of the answer is objected to by respondents' counsel as irrelevant.)

Q. 30. All those reports, you say, were forwarded to the defendants in London?

A. Yes, sir. A preliminary agreement was made with Mr. McKinn—an agreement, the result of my negotiations with McKinn.

Q. 31. What was that agreement?

A. To sell for thirty thousand dollars.

Q. 32. Sell what?

A. The Eastern States, to sell the patent, the Dennett prin-
95 ciple of fire-proofing.

Q. 33. A license or exclusive right to use and sell?

A. The exclusive right which I supposed I had.

Q. 34. Had you an agreement with McKinn for the exclusive right to use and sell this patent in the New England States?

A. Yes, sir.

Q. 35. What was the result of that?

A. They submitted it to their lawyers—the proposition—submitted the project—my agreement—to their lawyers——

Q. 36. (Interrupting.) They did not submit the agreement; that was already made.

A. I showed them what I supposed to be my power to sell.

96 Q. 37. And that they submitted to the lawyers?

A. Yes, sir; that they submitted to the lawyers who said I had no power to sell.

Q. 38. You submitted this agreement between you and Dennett & Company?

A. Yes, sir; they submitted it to their lawyers who said I had no power under it.

Q. 39. They reported back to you that you had no power to sell the exclusive right?

A. Yes, sir; I communicated that fact at once to Messrs. Dennett & Company.

Q. 40. By what means?

A. By letter.

Q. 41. By letter addressed to them at London?

97 A. Yes, sir; in London, England. In due time they replied. They were willing to make a new agreement or alter it. They intended to give me exclusive power.

(Complainant's counsel here offers in evidence papers marked respectively Exhibit No. 3 and Exhibit No. 4, being letters received by the witness from the respondents in reply to his communication informing them of the insufficiency of the agreement; said letters being respectively dated May 5, 1873, and December, 1873.)

Q. 42. Was it before or after this reply of the defendants that the negotiations between yourself and McKinn ceased?

A. Before.

Q. 43. About what time did they cease?

A. A few days after knowing of the document being insufficient.

98 Q. 44. A few days after they reported to you the insufficiency

of the contract to give you the right to sell the exclusive right to use the patent, negotiations between yourself and McKinn ceased?

A. Yes, sir.

Q. 45. Did McKinn, at any time, renew proposals to purchase?

A. No, sir.

Q. 46. How soon after the information given to you by McKinn of the insufficiency of the contract did you learn that Dennett & Company would amend the contract in that respect?

A. I think it must have been two months afterwards.

Q. 47. Did you, after receiving letters from Dennett & Company saying that they would amend the contract in the respect objected
99 to, attempt to reopen negotiations with McKinn or anybody else for this patent right for the New England States; if so, what was the result?

A. After getting their consent to alter it I made application again to McKinn, who refused to stand by his bargain on account of the delay. I have recommended it, and do to-day.

Q. 48. When you afterwards renewed or attempted to renew negotiations for the sale, how were you met?

A. By the same objections; that the instrument was insufficient.

Q. 49. Any other objections than that?

A. No; not to my recollection.

Q. 50. No other objections at all?

A. I think I said before on account of the delay, and they had taken up some other patent—McKinn & Company had.

100 Q. 51. (Mr. STETSON.) Do you know that? Is that something within your own knowledge?

A. Only through my agent, Mr. Fuller.

Q. 52. (Mr. HARRISON.) Had you conducted your negotiations with them through your agent or personally?

A. No; through Mr. Fuller.

Q. 53. Do you know what reply they made to him?

A. That is what he told me.

Q. 54. What?

A. That they could not wait.

Q. 55. I want to know what obstacles, if any, you found to the sale of this patent right.

A. The instrument was insufficient; that was the only obstacle
101 I knew of.

Q. 56. Have you copies of letters which you sent to the defendants regarding the insufficiency of the contract spoken of?

A. Yes, sir.

Q. 57. Produce them.

A. (Produces letters.

The letters produced by witness are dated, respectively, November 3, 1873, and March 5, 1874, and are marked, respectively, Exhibit No. 5 and Exhibit No. 6.

Said letters are offered in evidence by complainant's counsel, it being stipulated and agreed that copies of the same shall be made and appended to this deposition, said copy to be of the same force and effect for the purposes of this action as the original.)

102 Q. 58. Did you receive any reply to those letters from the defendants? If so, produce them.

A. Yes, sir; there was a reply. This (referring to Exhibit No. 4) was their reply.

Q. 59. When you were negotiating with Mr. Ingle on behalf of the

defendants for the purchase of this patent right, what, if anything, was said between you as to the drawing of a formal written contract as to how it should be done? Who was to do it?

A. His lawyers in New York, Van Stanvoort & Hauff.

Q. 59. (Repeated.)

A. It was informally agreed that I should have exclusive right to sell, and that Van Santvoort & Hauff, the lawyers of Dennett & Company, were to prepare the contract.

103 Q. 60. Who did prepare the written contract spoken of in your bill of complaint?

A. Van Santvoort & Hauff.

Q. 61. Under whose direction?

A. Mr. Ingle, the negotiating partner of Dennett & Company.

Q. 62. Were Van Santvoort & Hauff employed by you for the purpose of drawing the instrument?

A. No.

Q. 63. Did you give them any directions concerning its terms, or concerning it in any respect?

A. No.

Q. 64. In addition to what you have already testified to, what, if any, other steps have been taken by you for the purpose of introducing the patent and selling the patent right?

104 A. John Smith, of Chicago, made an application.

Q. 65. What did you do?

A. I sent that communication (referring to a letter) to him.

Q. 66. What was the result of that?

A. The result amounted to nothing, on account of my discovery of the insufficiency of the document.

Q. 67. When was that?

A. The letter is dated the 5th of March, 1873, after this.

Q. 68. That was prior to the negotiation with McKinn, was it?

A. It was about the same time. When I found the insufficiency of the document it was not on a basis to be submitted to anybody, therefore I dropped it.

105 Q. 69. Any other steps taken?

A. Yes, sir; I got the city hall commissioners of San Francisco to adopt it. They passed a resolution for that purpose.

Q. 70. How did that result?

A. It resulted in making preparation—iron beams throughout the building so far as executed.

Q. 71. Did they use the invention?

A. I am not aware that they did.

Q. 72. Have they refused to?

A. There is a modification of it used, so I am informed, but I have never seen it.

Q. 73. You have ceased to be architect of the building?

A. I have ceased to be architect of the building.

106 Q. 74. Can you estimate the amount of labor, time, and money expended by you in attempting to introduce this invention, and to sell it under your agreement with the defendants? If so, make the estimate.

A. It must have cost me over five thousand dollars; disbursements and travelling expenses, building specimen arches, and testing in various wa's in Boston, San Francisco, and New York.

(The last question and answer are objected to as incompetent, irrelevant, and immaterial.)

Q. 75. Have you made sale in any instance of this patent right, or do you know of its being employed in any case within the United States?

A. I have not made any sales. I am not sure whether it has
107 been employed in Boston or not.

Q. 76. But not with your consent?

A. McKinn & Co. undertook to use it under a license, but whether they have done so I am not aware.

Q. 77. Have you sold any license or received any money for the use of this invention?

A. I have not received any money. There was an arrangement with McKinn to work it by license, but whether he has done so or not I don't know; the thing was stopped when I found——

Q. 78. (Interrupting.) Did McKinn stop working under the license?

A. I don't know. I sent my letter resigning my position when I found out how the thing stood, and I have given it no attention. There are infringements to it throughout the United States. I am cog-
108 nizant of some, I think. A man might spend a fortune in defending this thing without any instrument to go on.

Q. 79. Are you still endeavoring to introduce this invention, or make sale of rights under it?

A. No, sir.

Q. 80. How long since you have abandoned making such effort?

A. Since my letters of November 3, 1873, and March 5, 1874, and during the time of the negotiations about the insufficiency of the agreement.

Q. 81. Why had you ceased to endeavor to introduce the invention since your letter of March 5, 1874?

A. I stated my reasons in those letters, which are my inability to sell, not having exclusive right.

Q. 82. Did you at any time inform the defendants that you
109 had ceased to attempt to introduce the invention under the contract?

A. Yes, sir.

Q. 83. When and how?

A. By letters of November 3, 1873, and March 5, 1874, addressed to Frederick Ingle at London, England.

Cross-examination by Mr. STETSON:

Q. 84. What time of year did Mr. Ingle come to this country in 1870?

A. About June, 1870.

Q. 85. Where were you living at the time?

A. At Albany, New York.

Q. 86. Where did Mr. Ingle stay?

110 A. He stayed at my house during that time; during the time he visited Albany.

Q. 87. How long do you suppose he was visiting there in all?

A. Six weeks; about six weeks.

Q. 88. In the summer or in the fall was he in Albany?

A. September, I think.

Q. 89. Do you remember when your negotiations with him about the purchase of this patent right began?

A. From the first of his landing until the time he left we were in constant consultation and argument with reference to the terms upon which he should give it to me.

Q. 90. When Mr. Ingle came over in June where did he go?
111 A. He went to Canada and different parts of the United States.
Q. 91. Did you see him in the month of June?
A. I did; in Boston.
Q. 92. Did you have negotiations with him there about it?
A. Merely conversations.
Q. 93. Did you have any negotiations or conversations with him about it in July?
A. All right straight from the time he came to the time he left.
Q. 94. When he was staying at your house in Albany how often did you talk the matter over?
A. During the day at my office and at my house.
112 Q. 95. You testified that a verbal proposition was made by him in regard to the sale of the patent. Can you fix the date of that verbal proposition—somewhere near?
A. About September. It was in a conversation. There was no absolute agreement. It was understood at a conversation that I was to have exclusive right to sell, at my house and at my office. I could not have entertained any other proposition whatever.
Q. 96. After having made that proposition or had that conversation, what further arrangement did you make about having it drawn up in writing?
A. I left it to Mr. Ingle to draw up the necessary papers.
Q. 97. Were all the terms of the document that was to be
113 drawn up previously agreed to?
A. Yes.
Q. 98. Everything?
A. Yes, sir.
Q. 99. Just as it stands in the contract?
A. Yes; to the best of my recollection; and more than what is in the contract; the prices of each section was in the original draft agreement.
Q. 100. I am not speaking about the draft agreement; but I am speaking about the verbal understanding that you had with him.
A. All the prices were agreed on for each section in conversation, and after that a draft agreement was sent to me to look at, and
114 these prices were there. I forwarded it back to Mr. Ingle—a modification of it. In the signed document sent to me by Mr. Ingle these prices were not put in, and I noticed it; but in writing to Mr. Ingle on endeavoring to obtain a sale for the Pacific States, section D, he wrote me those identical figures that was in the original draft except for this State, which he put at two hundred and fifty pounds less than what was in that draft.
Q. 101. Now, Mr. Laver, there are a good many words and provisions in this document, the contract set forth in the complaint. It contains fourteen different articles. I want to ask you, Mr. Laver, if all these articles and provisions had been arranged precisely as they were afterwards drawn up in writing, with the exception of the one defect we have been speaking of?
A. Exclusive power to sell?
115 Q. 102. Yes; I want to ask you of these things in this contract were previously arranged between you in word?
A. No, sir.
Q. 103. After this verbal proposition that you speak of had been made did Mr. Ingle leave Albany?

A. Yes.

Q. 104. Where did he go?

A. He went to Pittsburg; traveled around to New York, and finally stayed in New York.

Q. 105. I think you testified that he undertook to go to New York and get the contract reduced to writing?

A. Yes, sir.

116 Q. 106. Did he not agree to get a draft of the contract made and send it to you to examine?

A. Yes, sir.

Q. 107. Did he get such a draft made?

A. Yes, sir.

Q. 108. By his solicitors?

A. Yes, sir.

Q. 109. Was it sent to you to examine?

A. Yes, sir.

Q. 110. Did you examine it?

A. Yes, sir.

Q. 111. Thoroughly?

A. I read it once.

Q. 112. And understood it?

A. It appears not.

117 Q. 113. Did you understand it with the exception of the point that relates to exclusive rights?

A. Yes, sir.

Q. 114. In that draft did you not make corrections?

A. Yes, sir.

Q. 115. And you sent it back to New York?

A. Yes, sir.

Q. 116. To Mr. Ingle?

A. Yes.

Q. 117. Did not then Mr. Ingle agree to some of the alterations that you made and disagree to others?

A. He agreed to one; yes.

118 Q. 118. And to the other suggestions that you made he disagreed?

A. Yes, sir.

Q. 119. Did he not then have that draft engrossed, inserting the corrections which he had made, excepting this one which he disagreed to, and send the draft so engrossed back to you?

A. He sent the document itself back, with the corrections in it, for my signature. He was just leaving by the China, and it was done hurriedly at the last moment.

Q. 120. With the corrections in it?

A. With the corrections in it.

Q. 121. He sent the document back with the corrections in it; do you mean that something was interlined in it?

119 A. The draft was sent back to Mr. Ingle, who altered it to my suggestion, I think, in one instance, and after that he returned the document, re-engrossed, for my signature.

Q. 122. Then he did have it re-engrossed?

A. Yes; the last three pages of it, as I understood him.

Q. 123. And did you then examine it?

A. I read it; yes, sir.

Q. 124. And did you sign it?

A. I did.

Q. 125. (Giving witness a paper.) See if that is what you signed.

A. (After examination.) That is what I signed.

(The paper above referred to is the counterpart of the contract
120 delivered to witness by Dennett & Company.)

Q. 126. Did Mr. Ingle, when he sent this draft to you which you signed, send any letter accompanying it?

A. Van Santvoort & Hauff sent it to me, at Mr. Ingle's request, to sign, and after reading over, not noticing that the prices were not put in it, I signed it. The draft I had not got, and I had forgotten the omission of the prices and as to my exclusive right to sell. I did it unwittingly; evidently I signed that not knowing that I had not exclusive right to sell, because it was agreed between us that I should have it.

Q. 127. You thought that gave you the exclusive right?

A. I did; that was the terms agreed upon in our conversation,
121 that I was to have that exclusive right; and it was not discovered until two years or two years and a half afterwards that I hadn't it.

Q. 128. When Van Santvoort & Hauff sent this to you for your signature did they write a letter accompanying it?

A. Requesting my signature? Yes, sir.

Q. 129. I would like to see that letter.

A. It was just a short not' asking me to sign and acknowledge it before a notary and return it to him; which I did. The letter accompanying the re-engrossed draft was written by Mr. Ingle instead of Van Santvoort & Hauff.

(Letter from Ingle to witness produced, marked Exhibit No. 7.)

122 Q. 130. Having signed that re-engrossed draft, Mr. Laver, did you send it to New York?

A. Immediately.

Q. 131. How did you get the counterpart of it?

A. From Van Santvoort & Hauff.

Q. 132. By whom was that signed, if you remember?

A. I believe Dennett & Company signed that.

Q. 133 (giving witness letter). Look at that letter and see if that refers to this contract involved in this suit.

A. (After examination.) Yes, sir; that is my signature to it, and it is in my handwriting.

(The letter last above referred to is dated Albany, N. Y., 28th
123 October, 1870, addressed to Van Santvoort & Hauff, and signed "Augustus Laver."

It is agreed that a copy of said letter, which is marked Exhibit No. 8, may be made and appended to this deposition, said copy to be treated, for the purposes of this trial, as the original.)

Q. 134 (giving another letter). Will you look at that one and see if that relates to the same matter?

A. (After reading.) Yes, sir. I will observe in reference to that letter, when I say it was satisfactory, I had omitted to notice the prices of the different sections which Mr. Ingle sent me by letter before.

Q. 135. This letter is in your handwriting?

A. That is; yes, sir.

(The letter last above referred to is marked Exhibit No. 9. It
124 is agreed that a copy of the same may be made and attached to this deposition, to be of the same force and effect as the original.)

Q. 136. I think you said that Mr. Ingle was hurried while he was engaged in negotiating about this contract.

A. Yes, sir. At the last moment he was desirous of getting my signature, and in making these alterations it was doubtful whether the time would serve for him to sail by the China, then leaving New York.

Q. 137. You say Mr. Fuller held your power of attorney?

A. Yes, sir.

Q. 138. A power of attorney relating to these negotiations?

A. Yes, sir; only.

125 Q. 139. And the business, I suppose, under this contract?

A. That is all.

Q. 140. Has that power of attorney ever been revoked?

A. It was revoked by himself.

Q. 141. You never revoked it?

A. I never wrote to him to revoke it, or anything of that sort. He refused to have anything more to do with it. I thought that was sufficient.

Q. 142. Then he remained your attorney, with the same power, down to the time when you declined to have anything more to do with the business?

A. Yes, sir.

Q. 143. You say, Mr. Laver, that you attempted to sell the pat-

126 ent right for the New England States. Did you ever attempt to sell it for any other part of the country?

A. Yes, sir; Chicago, New Jersey, the Western States, including San Francisco.

Q. 144. Did you ever attempt to work the patent anywhere?

A. Yes, sir.

Q. 145. Where?

A. At the city hall, San Francisco.

Q. 146. Did you work it at all in the city hall in New York?

A. No; I had nothing to do with any city hall in New York.

Q. 147. I mean the capitol, at Albany.

A. There was a specimen arch built, and the commissioners passed resolutions to adopt it. I don't know any further, whether it was used or not.

127 Q. 148. And nothing more was done, except that you made a specimen arch?

A. And the commissioners passed a resolution to adopt it both there and in San Francisco.

Q. 149. In San Francisco do you know whether any work was actually done under this patent? Was any done by you?

A. There was none done, only preparations made by Joice.

Q. 150. You spoke of McKinn's attorney advising you that the instrument did not give exclusive rights. Do you remember who Mr. McKinn's attorney was?

A. No, sir.

Q. 150. I think you said that Mr. Fuller conducted these negotiations with McKinn.

A. Yes, sir.

128 Q. 151. You were not there personally?

A. No.

Q. 152. Did you know who was to draw up the agreement between Dennett & Company and yourself?

A. I am not aware that I did. I left it to his attorneys; it was arranged that way.

Q. 153. That is true; but did you know who Mr. Engle's attorneys were?

A. Not that time.

Q. 154. When did you first find out that Van Santvoort & Hauff were his attorneys?

A. Mr. Engle told me.

Q. 155. When did he tell you?

A. About the time the draft was being prepared.

Q. 156. Before any draft was sent to you?

129 A. Possibly; I can't swear to that.

Q. 157. Did you know them?

A. I had heard of them. I knew of them.

Q. 158. Did you ever make any objection to their doing it?

A. No, sir.

Q. 159. Did Mr. Ingle do anything to mislead you about the contract?

A. No, sir; I don't think anything was intended of a fraudulent character or otherwise. I was deceived in the contract and so was he. I don't know whose fault it was.

Q. 160. Mr. Laver, the agreement, as drawn up, contains a covenant on your part to work the invention in different parts of the United States and to pay the licenser the money, &c. Now it does not

130 appear that you ever did that. Am I right in supposing that you did not work the invention?

A. I advertised it, printed pamphlets, and made every arrangement, made preparation in various buildings for it. Then came the discovery that this agreement did not give me the proper power to sell, after my procuring customers for the New England States, which would, of course, place some fifteen thousand dollars in my pocket, and have enabled me to work the balance of the United States which I was then doing. That was a serious set-back to me.

Q. 161. Then is it not a fact that your principal efforts were directed to a sale of the patent rather than to the working of it?

A. No, sir; not at all. Both.

Q. 162. You say, Mr. Laver, that when you found out that the document was defective in this respect you wrote a letter to

131 Dennett & Company, or some of them, about it?

A. Immediately.

Q. 163. Do you remember the date of that letter?

A. No, I do not remember it, sir; Mr. Fuller also must have written.

Q. 164 (giving witness letter). Is that the letter which was written by you at the time?

A. (After reading the letter.) Yes, sir.

(The letter last above referred to is marked Exhibit No. 10. It is agreed that a copy thereof may be made and appended to this deposition, to be treated as the original.)

Q. 165. Did you receive a letter from them in answer to that?

A. Yes, sir.

132 Q. 166. Long after, or pretty soon?

A. About a month afterwards, I think.

Q. 167. In which, I believe, they offered to correct the defect in the contract?

A. Yes, sir.

Q. 168. And make a new one, if necessary, which would cover the ground?

A. Yes, sir.

Q. 169. Did they not also inform you that they had instructed their solicitors to draw up the necessary papers to carry out that design?

A. Yes, sir.

Q. 170. Did not the solicitors inform you that such a document had been made?

A. Yes, sir.

133 Q. 171. Then why did you not accept that suggestion?

A. In the mean time I considered the delinquencies were theirs as much or more than my own. I, in consequence, had lost the sale of the Eastern States—thirty thousand dollars—which was a very serious set-back for the enterprise. It enabled other patentees to put in their scientific inventions, which they did and prevented the negotiation for the sale of this entirely.

Q. 172. It would not have prevented you from further negotiations and further sales if you had had the amended document?

A. No; I was disheartened by the arg'eement being not of the proper character as was understood between us. It was such a serious drawback that I was disheartened on account, as I supposed, of their delinquency.

134 Q. 173. What delinquency do you refer to?

A. The exclusive power to sell, which destroyed the value of the document to me.

Q. 174. You mean simply that?

A. Simply that.

Q. 175. Do you know anything about a telegram from Dennett & Company offering to amend the contract?

A. It was communicated to me afterwards by letters.

Q. 176. By letter from Mr. Fuller?

A. Yes, sir.

Q. 177. Did they telegraph, in substance, offering to alter the document as you requested?

A. My recollection does not serve me, but I got a direct letter from them to that effect.

135 Q. 178. Afterwards?

A. Yes, sir; about a month afterwards. It must have been about six weeks; it takes a month in its transmission. Mr. Ingle was in the northern provinces at the time, which prevented his answering as quickly as possible.

Q. 179. Will you tell me the date when the McKinn negotiation ceased?

A. I cannot tell you the date. They had to send to England. I imagine the time was so great that they would not wait for the necessary documents. They seemed to be in doubt whether I should ever get it. I assured Mr. Fuller by telegram that I had got it, and I thought I had the power all right.

Q. 180. Who is McKinn?

136 A. I don't know him. Up to this time the patentees were satisfied with the energy I had given to the matter throughout the United States, and so stated in their letter.

Q. 181. You think you must have expended five thousand dollars in travelling, building specimen arches, making experiments, &c.?

A. Yes, sir; fully that.

Q. 182. How do you get at that sum?

A. I cannot give you now the items in detail. Mr. Fuller went five times to Boston, and staid there during the negotiations and whilst Professor Craft was making the tests. He was backwards and forwards there during that time.

Q. 183. Have you any accounts which would show the expenses?

A. Only my own.

Q. 184. Would those show in detail?

137 A. No, sir; it was not obligatory for me to keep accounts of expenses in detail. I never anticipated this course the firm would take.

Q. 185. Were there any other travelling expenses incurred than those that you have mentioned?

A. From Albany to Chicago.

Q. 186. More than once?

A. No, sir.

Q. 187. You reckon Albany as the starting point in all these journeys?

A. Yes, sir.

Q. 188. Do you know what the railroad fare is from Albany to Boston?

A. I do not.

Q. 189. From Albany to Chicago?

A. I do not remember.

138 Q. 190. It would not exceed, I suppose, at that time, twenty-five dollars from Albany to Chicago, would it?

A. I should think more than that.

Q. 191. Much more?

A. No; could not be more than thirty or thirty-five. Whatever it would be now, it would be then, I suppose. I don't think it is changed.

Q. 192. What is the fare from Albany to Boston; it was not over four dollars, was it?

A. Yes, sir; then there was hotel expenses.

Q. 193. I mean the railroad fare.

A. No; I don't know what that is.

Q. 194. Somewhere in the neighborhood of four or five dollars, was it not?

139 A. Five or six dollars.

Q. 195. When Mr. Fuller went to Boston did he stop there long?

A. Yes, sir.

Q. 196. How long?

A. Three or four days, five days, perhaps.

Q. 197. When he went to Chicago did he stop long there?

A. It was I went to Chicago.

Q. 198. How long did you stop?

A. Three days.

Q. 199. Have you any idea how many specimen arches were built?

A. I built one here, and Mr. Fuller experimented in New York with reference to the capitol. Mr. Ingle also built an arch there.

140 Q. 200. Did he build that at your expense?

A. I think he found everything on that, with the exception of bricks. I think the capital commissioners found brick.

Q. 201. So that you did not pay anything for that?

A. I did not pay anything for that.

Q. 202. What did it cost to build a specimen arch?

A. I forget what it cost here. We had all the bricks broken——

Q. 203. (Interrupting.) Could you give us an idea whether it was five dollars or fifty?

A. I should think fifty dollars would cover it.

Q. 204. Then there were some experiments, testing, &c., in Boston and other places; were those costly or otherwise?

141 A. I don't know the absolute cost of Mr. Fuller's expenses in detail. They amounted to something about a thousand dollars.

Q. 205. In gross?

A. Yes, sir.

Q. 206. Including his journeys to Boston?

A. Yes, sir.

Q. 207. You say McKinn had a license?

A. Yes, sir.

Q. 208. From whom?

A. Mr. Fuller.

Q. 209. Mr. Fuller made it in your name?

A. Yes, sir.

Q. 210. As your attorney?

142 A. Yes, sir.

Q. 211. Do you know, whether McKinn has that still?

A. No; I do not know.

Q. 213. You do not know, of course, whether McKinn has paid anything under it?

A. I do not.

Q. 214. How long did that license run? Do you know?

A. It was a current license till I wished to stop it, I believe. Mr. Fuller made it; when I discovered the defect I relinquished all those things. Mr. Fuller would not have anything more to do with it there, in consequence of which I could not have, unless by appointing another agent. It seemed to be injured, if not destroyed, by the fact of my not being able to sell, and other pat'erns being brought into the market.

143 Q. 214. (Mr. HARRISON.) By "being unable to sell" do you mean by being unable to sell the exclusive right?

A. Yes, sir. All my advertising and pains was taken advantage of by others who probably saw a good thing in what I was trying to do, and they did it in lieu of me.

Here a continuance is taken until Thursday, 29th inst., at 2 o'clock p. m.

THURSDAY, *March* 29, 1877.

By consent a further continuance is taken until to-morrow, 30th inst., at two o'clock p. m.

FRIDAY, *March 30th*, 1877.

Cross-examination of A. Laver continued:

144 Q. 215. (Mr. STETSON.) You have spoken, Mr. Laver, about a conversation with Mr. Ingle at which the terms of the contract were verbally agreed on. When was that conversation?

A. Chiefly at my residence at Albany.

Q. 216. Chiefly in your residence in Albany?

A. And in the office. We had quite a little talk after leaving the office, at my house, turning on the terms and general working of the patent throughout the United States. It was certainly necessary to have a preliminary conversation before a basis of agreement could be had,

Q. 217. Was there any conversation as to that arrangement anywhere else than in Albany?

A. Not so special. There was a talk of it in Boston when I

145 first met Mr. Ingle on arriving by the steamer from England.

Q. 218. How long a time did these negotiations cover?

A. I should think about two months.

Q. 219. When did he arrive from England?

A. About the month of June, I think. I cannot tell you exactly without referring.

Q. 220. Can you fix the time when he left Albany to go to New York to get the document drawn up?

A. I' must have been a fortnight before it was executed.

Q. 221. It was executed by him on the 2nd of November?

A. Yes, sir.

Q. 222. You think, then, he had left Albany for New York
146 about the middle of October?

A. He was traveling round all over the country. He went to Canada, to Niagara Falls, to Pittsburg, to Boston, to Syracuse, and all round; and I was in constant communication with him as to what he had seen in various cities, sometimes bearing upon the introduction of this patent and in reference to gypsum quarries and other works. He finally wound up at Albany where a special conversation and general argument ensued; and upon this conversation——

Q. 223. The traveling, then, that you speak of was before you finally arranged the terms of the contract verbally?

A. Yes, sir.

Q. 224. How long did he stay in Albany?

A. He stayed in Albany at periods of——

147 Q. 225. (Interrupting.) No, at this time.

A. Perhaps a week.

Q. 226. And then went to New York about the middle of October?

A. No, sir; he went also to Jersey City, in connection with a late partner of mine, Thomas Stent. At my recommendation he endeavored to introduce it in Jersey through him, and they built a specimen arch.

Q. 227. Did you have any other correspondence with Mr. Ingle, after he went to New York the last time from Albany, except the letters that have been put in evidence?

A. No, sir; I think not.

Q. 228. You say the verbal agreement distinctly contained a provision for exclusive rights?

148 A. I do.

Q. 229. Was that the only provision the verbal agreement contained?

A. No; it also contained the exclusive right to vend the license to use.

Q. 230. Will you state what the verbal agreement did contain; what its provisions were?

A. It contained an exclusive right to dispose of the patent for so much money in four districts, being about the sum of forty thousand dollars for the whole. It also said—the understanding was—that I should have exclusive right to license to others for the purpose of working the patent. I thought the agreement stated both, and that is where the trouble comes in.

Q. 231. We are speaking of the verbal agreement now. What
149 other terms were there in the verbal agreement?

A. Only the matters of payment, I think.

Q. 232. Was there anything in the verbal agreement about arbitration?

A. I proposed that, but Mr. Ingle would not accede to it, and I waived

it. I proposed that if there were any disputes in reference to the agreement, that we should have an arbitration. Believing the agreement all sufficient, I waived that point, and the agreement was signed and forwarded.

Q. 233. Was there anything in the verbal agreement about surrendering your license?

A. I do not remember that specially; I think not.

Q. 234. Was there anything in the verbal agreement as to the time for the royalty to be paid?

150 A. No, sir; nothing special as to that.

Q. 235. Was there anything in the verbal agreement as to keeping full and correct books of account of the work done under the patent?

A. That was understood.

Q. 236. In your verbal conversations?

A. I believe so.

Q. 237. Was there anything in the verbal agreement about your surrendering the license at any time on giving six months' notice?

A. I could not say that there was.

Q. 238. Was there anything in the verbal agreement about all advertisements of the work containing the words "Dennett's Patent"?

A. No further than I was expected to give it proper promi-

151 nence. It was understood that, taking the patent, I should not leave it to lie idle.

Q. 239. There was no definite understanding as between you verbally that you should put the words "Dennett's Patent" on everything?

A. Oh! undoubtedly. I should not hesitate to say that there was an understanding of that kind.

Q. 240. That the words "Dennett's Patent" should be on all of the work; that was in the verbal agreement?

A. I cannot recollect; but it was perfectly right that it should be done in that way, and it was done so.

Q. 241. When Mr. Ingle got to New York he had prepared and sent to you a draft of a written contract?

A. Yes, sir; to the best of my recollection he had.

152 Q. 243. Did not that first draft contain the same language which the contract did when executed, so far as the exclusive rights were concerned?

A. I believe it did.

Q. 244. After Mr. Ingle went to New York, about the middle of October, did you see him again?

A. No, sir; I think not; I believe not.

Q. 245. Did you have any communication with him after that except by letter?

A. No.

Q. 246 (giving witness letter). Did you write that letter, Mr. Laver?

A. Yes, sir.

Q. 247. Who are Van Santvoort & Hauff, the people to whom this paper refers?

153 A. Patent lawyers, in Park row, New York.

Q. 248. Were they Dennett & Company's solicitors at the time?

A. Yes, sir.

(The letter last above referred to is here offered in evidence by respondents' counsel, and marked Exhibit No. 11.)

Q. 249. After the contract was executed, Mr. Laver, did you not have repeated letters from Dennett & Company urging progress in your work?

A. Yes, sir.

Q. 250. Did you ever make any objection to this contract on account of the defect to exclusive rights before the spring of 1873?

A. No; I did in reference to the prices——

154 Q. 251. (Interrupting.) I mean only this point as to exclusive rights.

A. No; I did not.

Q. 252. During that time, from the date of the contract to the spring of 1873, do you know of Dennett & Company's having applications to purchase rights under their patent and referring them to you?

A. Yes, sir.

Q. 253. (Mr. ROBINSON.) Do you know this, or have you only heard of it?

A. I know it through letters. The letters were written to Dennett & Company in London, which were forwarded to me, all of which I attended to.

Q. 254. (Mr. STETSON.) What did these letters purport to be? You need not state their contents.

155 A. Inquiries about the patent.

Q. 255. About purchasing it, or rights under it?

A. No; about using it in a single building; for example, some in Boston, some in Chicago, and some elsewhere.

Q. 256. Did you ever grant any such rights?

A. No, sir.

Q. 257. Why not?

A. Parties did not require it after getting particulars. My answers to these letters showed what disposition was made in those cases.

Q. 258. Did not the great fires in Boston and Chicago take place after you had made this contract?

A. Yes, sir.

156 Q. 259. Did they both take place before the spring of 1873?

A. Yes; the Boston fire was in the winter before the spring of 1873, and on account of this fire application was made for the New England States, and a bill was placed before the legislature for the purpose of forwarding this very patent if it was proved to be what I represented.

Q. 260. Would not those fires furnish a good opportunity for working that patent in those States?

A. Immense.

Q. 261. Why did you not attempt to work it yourself when you found it was impossible to sell it?

A. I had received such a set-back from the loss of the sale that

157 I at once communicated to Messrs. Dennett the fact that I would advance its interests privately, but relinquished it so far as the contract was concerned, as my letter, I think, shows.

Q. 262. Do you remember that in the contract you agreed to devote all your energies, &c., to working the patent?

A. I do.

Q. 263. I want to ask you once more as to the details of the money that you say you paid out in trying to introduce this patent, &c.

A. I could not give you details. It amounts to large sums in small disbursements, small or large disbursements, running over a period

from the time of signing the contract till the spring of 1873—law expenses, travelling, telegrams, cable telegrams, &c.

Q. 264. Were those expenses incurred in connection with introducing the patent?

158 A. Chiefly for the Boston negotiations. I visited a good many gypsum quarries throughout the country in California. After all this time and in my own case it has been to the detriment of my private practice.

Q. 265. The five thousand dollars that you refer to as expended was in money actually paid out, or does it include time?

A. Yes; fully five thousand dollars has been paid out; that is my estimate, without being able to go fully into details. I have looked into the matter, and cannot place it at less than that. That did not include the time spent.

Q. 266. In the case of Dennett vs. Laver, in this court, do you recollect setting up in your answer the fact that you had incurred these expenses?

A. Yes, sir; I think there was something said of it.

159 Q. 267. Don't you recollect that you put their value at a lower figure?

A. No, I do not remember it.

Q. 268. I think you did; I think it was three thousand dollars. I wanted to account for the difference.

A. Well, in thinking over, it being a protracted suit, I have given it some consideration, and I find that five thousand dollars, in my estimation, is the least amount that I have expended in travelling and in the way set forth.

Q. 269. What kind of money are you estimating in—greenbacks?

A. Yes; some of it was expended when greenbacks were worth a great deal less than they are now. Some of the disbursements were made in greenbacks when gold was at a high premium.

160 Q. 270. I am informed that Dennett & Company instructed their solicitors in New York to prepare a new agreement which should cure the defect in the old one, and that they did so. Did you have any information at the time to that effect?

A. Not at the time.

Q. 271. When did you get it?

A. I think somewhere about two months must have elapsed before I knew of it; two months after my showing the defect, as I supposed, in the agreement.

Q. 272. You were in San Francisco at the time?

A. I was.

Q. 273. And Dennett & Company were in the habit of communicating with Mr. Fuller, your agent?

A. Yes, sir.

161 Q. 274. Did you ever go to Van Santvoort & Hauff and do anything about making that agreement?

A. No, sir.

Q. 275. Did you ever instruct Mr. Fuller to go?

A. No, sir.

Q. 276. Did you ever write to Van Santvoort & Hauff about it?

A. No.

Q. 277. Did you, in short, do anything towards carrying out Dennett & Company's suggestion to cure the defect which you had discovered yourself?

A. I wrote to them asking them to cure the defect. They complied with the desire.

Q. 278. (Mr. ROBINSON.) You say they expressed a desire to comply with it?

162 A. Yes; they expressed a desire to comply with it. They forwarded instructions to Van Santvoort & Hauff to cure the defect, and write a new agreement if necessary.

Q. 279. (Mr. STETSON.) You were informed that they had done so?

A. Yes; they took the initiative throughout after I had spoken of the defect. The time was so long between the preparing of the agreement and the time of my informing them of it that the parties with whom I was negotiating were off their bargain. Other patents had been pressed upon them, and I suppose they had taken up with some other arrangement. The intention was, as I said before, to make this a compulsory thing, if possible, by an act of the Boston legislature—for the city of Boston I would say—make it a municipal order—ordinance. And by that means, it is easy to be seen, it would have

163 been immensely profitable, after purchasing the patent and leaving me my portion of the price that was to be paid, namely, thirty thousand dollars. That, of course, I lost.

Q. 280. When did you inform them of the defect?

A. As soon as it was discovered.

Q. 281. Give the exact date, as near as you can.

A. I was consulted by Mr. Fuller by telegraph. I answered by telegram that there was no doubt, in my opinion, about my having exclusive right to sell.

Q. 282. When was this correspondence with Mr. Fuller; can you fix the time?

A. It must have been in the spring of 1873.

Q. 283. You do not know the exact date, nor anywhere near it?

164 A. No; probably February.

Complainant rests.

(Endorsed:) Filed February 6th, 1878. L. S. B. Sawyer, clerk, by J. F. O. Beirne, dep'y clerk.

(Here follows pamphlet entitled "Dennett's Fire-proof Floors; instructions for the arrangement and execution," and marked Complaintant's Exhibit No. 1, to deposition of A. Laver, on file.)

165 *Letter: Fred'k Ingle to Thos. Fuller.*

MAY 5, 1873.

THOS. FULLER, ESQ'R, *Arch't,*

Albany, N. Y., U. S:

DEAR SIR: Your letter of the 15th ult. was duly rec'd here on the 30th and forwarded to me in Liverpool, where I was then staying. As I had not the copy of our agreement with Mr. Laver with me, I could do nothing until my return to town. I think the objection about the *the* terms of the license is somewhat trivial, but there is no objection on our part to alter it in any way to suit the requirements of the case. You will bear in mind that this lease was granted to Mr. Laver to pay as an annual royalty. If it had been proposed then to purchase out and out, I dare say the terms as to exclusive right would have been more precise; at any rate, our intention was for Mr. Laver to have the ex-

clusive right (in all our negotiations), & when the document
166 was signed we looked upon it as so settled unless he elected to throw it up before certain dates for the respective sections as specified in the agreement. He had the document to examine before signing it, & could have made the objection then. At any rate you will, I think, give us credit for having faithfully carried out both the letter and spirit of the agreement. We have had many applications from parties for permission to work the patent in the U. S. since Oct., 1870, the date of our agreement, but have had to reply in each case that our arrangements as to licensing were made.

I enclose you some correspondence with a Chicago gentleman (who called upon me before Xmas) & a pressed *of* copy of my reply. Will you write to him & make such arrangements with him as are convenient to you, or arrange for Mr. Laver to do so?

167 I shall write to our solicitor, Mr. Van Santvoord & Hauff, of Times building, Park row, New York, and instruct him to get whatever you require with regard to the specification. I don't know in what respect it is incomplete. The agreement can be altered to give any parties who propose to purchase the most absolute rights on payment of the purchase money of section B. Mr. Laver wishes me, in a letter from San Francisco, dated 29, March, to state to you what is the correct sum we would take, for cash, for the purchase of section B out and out. The original offer I made to Mr. Laverwhen I was in Albany was:

Section	A	3,250£
Do.	B	2,750£
Do.	C	2,250£
Do.	D	1,750£
		£10,000

I have already repeated the offer of section D at his request—
168 £1,750—& he has been some months negotiating ab't the sale in San Francisco.

For section B we would take, cash, £2,500. Of course, if these sales are effected we should not required the royalty to be paid on section B, for which Mr. Laver has already become responsible.

I fully explained to Mr. Laver, a few weeks ago, how matters stood with regard to money for minimum royalty which had become due, & would become due, each quarter year on the several sections, & have heard from him at some length in reply. He asks us not to press too hardly, as you are on the point of completing the negotiations for section B. To facilitate completion of the matter, had you not better write to or see Mr. Van Santvoord, whom we will instruct to give you as much assistance as he can. We could not, of course, undertake
169 any litigation in respect of infringements after we had disposed of our rights for a fixed sum. This could never be expected. We can only say we have had no trouble of this sort here since the patent was granted, & have not spent ¼d. in litigation, & our business has always been rapidly increasing.

Yours, truly,

FRED'K INGLE.

P. S.—Since writing the above I have seen our patent agent in London, and shown him the copy of the agreement. He thinks that the terms of the agreement were sufficient for the purpose it was made for,

but it is hardly precise enough as to Mr. Laver's "exclusive rights," now that he proposes to sell. Our wishes have always been to give him exclusive rights, & I thought that the agreement expressed as much before you raised the question. At any rate we are willing to alter it to facilitate your negotiations. The question is, how is it to be done?

170 One plan is for us to send power of attorney out to Mr. Van Santvoord, & tell him to alter the agreement & sign for us. Another, &, I think, a preferable plan, is to write to him to prepare two fresh copies of agreement distinctly giving Laver exclusive rights, & referring to the old agreement, which will be thereby cancelled. He will then let you see the alterations. One copy must be sent to Laver for signature & another to us, & on the return you & Van Santvoord can exchange them. You must clearly understand, however, that we shall not consent to any other alterations, or to introduce any fresh clauses.

We agree to this alteration, because it is only what we have (all through the affair) intended & acted upon, & although Mr. Laver is bound by the agreement as it stands, we should not think of taking advan-

171 tage of any technical omission as long as the spirit of the agreement is not interfered with. We trust that you will be able to complete the negotiation now without delay, & be in a position to pay over the cash for this section, as it is true some tangible return was made to us in one way or another. I shall write to Van Santvoord, & also to Laver, in a day or two.

The report from the Arch'ts Inst., Boston chapter, was very satisfactory.

I sent you telegram to-day:

"Dennett will alter agreement, giving Laver exclusive rights."

With kind regards to self & family,

Yours truly,

F. INGLE.

172 *Letter: Fred'k Ingle to A. Laver.*

5 WHITEHALL, LONDON, S. W., *December* , 1873.

AUGUSTUS LAVER, Esq.,
New City Hall, Commissioners' Office,
San Francisco, Cal'o., U. S.:

DEAR SIR: Your letter of Nov. 3d was received in due course. I was so much surprized at its contents that I felt it necessary to go to Nottingham to see Mr. Dennett before writing to you, so that some little delay has occurred previous to my reply.

You blame us for certain alleged "informalities and delinquencies" which you state have prevented the sale of the patent rights for Massachusetts. You say further that you will have to refuse to sign the new agreement, but that you will be happy to do all you can for our fire-proofing, provided we are willing to receive such royalties as "may be produced and can be collected." The only inference we can

173 draw from these remarks is that you propose to repudiate the agreement under which we granted you the license to work the patent for the whole of the United States, and under which you undertook to return certain minimum amounts as royalty, commencing from certain dates.

We must therefore draw your attention to the following facts:

The agreement of October, 1870, was carefully considered & signed by you and by myself on behalf of my firm. You are legally bound by that agreement, and, inasmuch as we have faithfully complied with the engagements to you which it contains, we have no intention of giving up any rights which it conveys to us. When your partner, Mr. Fuller, and yourself wrote to say that the parties in Boston (with whom you were in treaty for the sale of section B) complained that the agreement did not grant you sufficiently exclusive rights, we, acting
174 in perfect good faith with you, replied that in our opinion it did give you sufficiently exclusive rights for the purpose originally contemplated, but that if it would further your negotiations with the "Boston people" we were willing to alter it to suit your wishes in that respect, and we gave our solicitor in New York instructions to correspond with you accordingly. This offer was made in your interest, not ours, and we do not wish you to sign a new agreement unless it suits your purpose to do so.

Another objection raised was that the life of the American patent was found, by an act of Congress, to be terminable at the same time as the English patent. This objection was answered by our pointing out that the patent was granted at Washington at a date prior to the act of Congress referred to; that it was granted for 17 years from Aug't 13th, 1863, and that it was undoubtedly good for that time.

175 A third objection raised was that our agreement we did not undertake to defend the patent right after the proposed sale of one or more sections. Our answer to this was that we certainly had not undertaken to do so; that it was quite unusual and unreasonable to expect that we should; that we had done and continued to do a large and profitable business under our patent in G't Britain, and had found no occasion to go to law with respect to it. The patent underwent the supervision of the authorities at Washington, and you have held the license solely & absolutely for three years, & not until royalties have become due have you raised any question as to validity.

The objections raised by you have been all fully & fairly met; but we wish to remind you that they are altogether beside the ques-
176 tion of our original agreement, and the responsibilities it entails upon each of the parties thereto. We have kept our part of the bargain; you have not fulfilled yours. You attempt to make us chargeable with the failure of certain negotiations which were not conducted by us, which were not referred to in our agreement, and you attempt to repudiate the liabilities under which it places you.

Some time ago you asked us to give you time with regard to the payment of royalties then due, on the ground that certain sales were on the point of being effected, and you promised that a sum of money should then be paid to us. We consented to postpone our claim for a short time, but as you now seem to be desirous of ignoring your liabilities altogether, we have no alternative but to give you notice that if the amounts due to us up to Sept. 30th, 1873, under the agree-
177 ment (of which we enclose you an account), or at least £500 on ⅜ thereof, be not paid to us here, or to our solicitors, Messrs. Van Santvoord & Hauff, Times buildings, Park place, New York, on or before the 14th day of February, 1874, we shall instruct them at once to proceed against you for the recovery of that amount, and you will please accept this letter as formal notice to that effect. We shall also expect a further £500 on ⅜ to be paid on or before the 30th day of

March next, & the balance £250 on this a/c, together with such further sums as may have accrued to Xmas, 1873, on or before the 30th day of April next. We are acting under the advice of our solicitors, and patent agents in London, in whose hands we have placed the matter.

You speak of the great expense & trouble you have incurred, but you seem to forget that we have also had equally great expenses and
178 trouble, & have besides, by our preliminary negotiations & agreement with you, been prevented from granting licenses to other parties and from receiving any profit from the patent during the four years which have elapsed since it was granted to us at Washington.

I am, dear sir, yours faithfully,

FRED'K INGLE,
For ROB'T DENNETT & CO.

179 *Letter: A. Laver to Fred'k Ingle.*

SAN FRANCISCO, CALIFORNIA, *Nov'r 3rd*, 1873.

FREDERICK INGLE, Esq'r,
5 *Whitehall, London:*

DEAR SIR: I have thus long delayed writing to you until I should hear from Mr. Fuller, since the discovery of the informalities which, at the time, had they not existed, would have resulted in the sale of the patent for Massachusetts for the sum of $30,000, then agreed to and the document drawn up, which can at any time be substantiated; since then, however, the parties refused to buy. Mr. Fuller has used all his influence in Boston in the endeavor to induce them to adhere to the original proposition, but without effect; they have simply consented to work the patent on a royalty, as they can collect it. Mr. Fuller, who has just returned from Boston, informs me that they have done
180 nothing at present in its introduction, the architects not being able to persuade their clients to employ the "Dennett" principle of fire-proofing.

After all the time expended, and trouble & expense to myself and partner, entirely through the informality referred to, occasioned on your side, appear to end the success of the patent as a right, as it is now generally believed the right cannot here be protected and maintained in law.

At the time of the Boston negotiations I thought I saw a bright future, as stated in former letters, but, unfortunately for me, after having done my best and spent between three and four thousand dollars, with labor, now apparently lost, I find, owing to the delinquencies stated, I shall at this late hour have to refuse signing the new agreement consequent on the deterioration.

I have made preparations in the new city hall, hall of records,
181 & law courts now building under my supervision, but I estimate that this alone will cover the amount asked for section D, and the Albany capitol, if used, that for section A.

The prime mover and capitalist in the company proposed to be formed here, I regret to say, is now dead; he made the same important objections as did the Boston negotiators for the fire-proofing, which turns out so unfortunate for me in the mistaken position held through the informalities.

Should you see it to be your interest to simply receive such royalty as may be produced and can be collected, I shall still be happy to do all I can for your fire-proofing. I think you should undertake legally

to protect the patent; until then I fear little can be done in the collection of royalties.

Hoping something will yet transpire further than I have given
182 for the benefit of the patent, and expecting to hear from you at an early day, with regards to Mr. & Mrs. Dennett & family circle, I am, yours faithfully,

AUGUSTUS LAVER.

183 *A. Laver to Fred'k Ingle.*

SAN FRANCISCO, *March* 5, 1874.

FRED'K INGLE, Esquire:

DEAR SIR: Considerable delay has occurred in my being able to reply to yours of the Dec'r, 1873, no other date being appended to the document, owing to my having to write to Mr. Fuller as to what he had done under my power of attorney. A delay has also been occasioned by the snow storms on the Union and Central Pacific Railways.

First. I am advised by Mr. Fuller that there are three patents in use in the Eastern States that are held by architects and others to be cheaper and more applicable than the "Dennett" patent; primarily, on account of the uncertainty of obtaining the consent under a guaranty, or
184 on getting it at all. In some localities these uncertainties, added to the fact of your not considering your own patent worthy of protection as against infringement, speak for themselves; and on discovering that you had not, although perhaps intending to do so, given me exclusive right to sell or otherwise dispose of the patent, prevented the sale for Massachusetts for the sum of thirty thousand dollars. The papers were all drawn up when this was discovered, and in the i'terim of writing to you for power to sell, &c., the parties were off their bargain. This phase of the question having been raised abroad I, fear that little, except in my own practice on the city hall and law courts, and Mr. Fuller's on the capitol, both of which have been passed on by the respective commissioners, subject to our dictation, can be done with it.

I think very highly of it, and ever shall, but as an enterprise
185 it has been destroyed through your not giving me legal power in the premises to sell. I have no doubt your intention was good, but, as it turns out to be without force, I cannot see where I can be held responsible. I have given my time and money on account of this, and all to no purpose. I am the injured party, suffering under your informalities.

I was amazed when I found the papers did not allow me the exclusive rights to sell, and lost no time in communicating this to you.

There would have been no difficulty in paying your alleged claims had these delinquencies on your part not occurred, and the damages thereby incurred will be c nsiderable; unless something is done at once, Mr. Fuller and myself will be compelled to advise our respective commission's to rescind their resolution to employ your principle of fire-proofing.

186 I am yours truly,

AUGUSTUS LAVER.

P. S.—It will take very little to shake the confidence of the commissioners at Albany and here in this principle of fire-proofing, and to take up with one of the other local patents if it is used on these two build-

ings. I believe sections A and C could be sold, but would take no responsibility under present arrangements, & could not advise others to do so.

187 *Letter: Fred'k Ingle to A. Laver.*

PARK ROW, NEW YORK,
October 29, 1870.

DEAR SIR: I received your telegram yesterday & y'r letter this morning. I note your alteration on the agreement, & am sorry that you should have signed it before writing to me on the subject, as I can not consent to have clause 12 erased, after the ample time I have given you to work the patent before becoming subject to any minimum amount of royalty. I must have some definite line drawn. The question of time has been fully discussed between us & settled, & if after that you fail to pay the minimum royalty when it is due, you fail to comply with what is to us the most important covenant on the agreement.

188 This would be no matter for an arbitration, nor do I think that arbitration would avail you anything on the face of a direct traction of an agreement.

Your proposal seems to point to an indefinite prolongation of the time allowed for preliminary working, & I remember when discussing the question of time with you in Albany last week that you suggested that a further extension if required by you sh'd be a matter *upon which* for arbitration, and I distinctly declined to agree to anything of the sort.

The arbitration duties arise in case of dispute, and not upon a question about which there can be no dispute.

I have returned the agreement with the two last pages rewritten, and I am having a counterpart prepared in the mean time. In the course of post I shall receive this from you again on Tuesday the 1st p'mo, & I shall be ready to sign the counterpart *to sign to sign the counterpart* as soon as it arrives.

189 As I leave the day after for England, you must be good enough to return the agreement at once.

I am, yours truly,

FRED'K INGLE.

I do not object to your alteration of the 11th clause.

190 *Letter: A. Laver to Van Santvoord.*

ALBANY, N. Y., 28*th Oct'r*, 1870.

VAN SANTVOORD, Esq., N. Y.

D'R SIR: I herewith enclose agreem't transmitted to me for signature; two modifications I had to make not contemplated in a preliminary document which would not place me in a right position before an arbitration' sho'd one be required.

Y'rs respectfully,

AUGUSTUS LAVER.

191 *Letter: A. Laver to Van Santvoord & Hauff.*

ALBANY, 6*th Nov'r* 1870.

Messrs. VAN SANTVOORD & HAUFF, *New York:*

GENTS: On my return home I found Mr. Ingle's letter with the agreem't you also sent me.

As Mr. Ingle's explanations were satisfactory in reference to clause 12, I herewith enclose the document with my signature attached, & duly witnessed as directed.

I am, gent'm., yours truly,

AUGUSTUS LAVER.

Rec'd Nov. 9, '70.

192 *Letter: A Laver to Fred'k, Ingle.*

SAN FRANCISCO, 26*th Ap'l*, 1873.

FRED'K INGLE, Esq.,
5 *Whitehall, London, England:*

D'R SIR: It now turns out, just as Mr. Fuller and myself are about to close negotiations for the sale of your patent right, that I have no power to sell. Will you, therefore, send me the proper papers from y'r firm, stating that you will not grant licenses to any one else in the U. S.? I enclose you an eminent legal opinion thereon. Mr. Fuller had arranged for the sale of Mass., which includes Boston; but we wait for your proper authority, which must be exclusive, or no value can be attached to the license I hold. Of course I am aware of the understanding which I have stated y'r firm would not go back on, but then the parties purchasing hold that it is not exclusive. In like
193 manner I am unable to close with parties here for section D. I have had so much trouble with this matter, & now that it appeared to be in a good way to be productive of profit this annoyance arose. You can, however, remedy it in the way prescribed.

Y'rs very truly,

AUGUSTUS LAVER.

P. S.—Send the papers to Mr. Fuller, at Albany, & then he will send me duplicates.

A. L.

194 *Letter: A. Laver to Van Santvoord & Hauff.*

ALBANY, 17 *Nov.*, 1870.

Messrs. VAN SANTVOORD & HAUFF,
Park Row, New York:

GENT'M: As I am about leaving for Chicago & the West, I shall feel obliged if you will forward me the agreem't which Mr. Ingle informed me he had executed, to be returned as soon as I had sent to you the one signed by me; this I did about 10 days since. I sh'd like to have the document before I leave, as I shall require to refer to it in making arrangem'ts with parties in the West for the introduction of the patent.

Y'rs respectfully,

AUGUSTUS LAVER.

195 *Order that a commission issue to take testimony on behalf of the defendants.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL., DEFENDANTS.

On reading and filing the stipulation of the parties hereto, dated

June 4th, 1877, it is ordered that a commission issue out of this court directed to William Speed, George Woodford Lawrence, Henry Fawcett, and Henry Alexander Giffard, of London, England, or either of them, and empowering any one of them to take the testimony of Frederick Ingle, of said London, a witness on behalf of the defendants, on interrogatories and cross-interrogatories already filed.

Dated June 5th, 1877.

(Signed) OGDEN HOFFMAN,
District Judge.

196 (Endorsed:) Filed 5th June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

197 *Stipulation that a commission may issue to take testimony on behalf of defendants.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL., DEFENDANTS.

It is stipulated that a commission may issue in this case in term or in vacation (as may happen) directed to William Speed, George Woodford Lawrence, Henry Fawcett and Alexander Giffard, of London, England, or either of them, and empowering any one of them to take the testimony of Frederick Ingle, of said London, a witness on behalf of the defendants. This testimony is to be taken on interrogatories and cross-interrogatories filed herewith.

STETSON & HOUGHTON,
Solicitors for Defendants.
PIXLEY & HARRISON,
Solicitors for Complainant.

198 Dated June 4, 1877.

(Endorsed:) Filed 4th June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

199 *Commission to take the testimony of Frederick Ingle.*

The President of the United States of America to William Speed, George Woodford Lawrence, Henry Fawcett, and Henry Alexander Giffard, of London, England, greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, or either of you, commissioner, and by these presents do give you, or either of you, full power and authority diligently to examine upon his corporal oath or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed, Frederick Ingle, of London, England, as a witness on the part of the defendants in a certain cause now pending, undetermined, in the circuit court of the United States of the ninth judicial circuit in and for the district of California, wherein Augustus Laver is plaintiff
200 and Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Co., are defendants.

And we do further require you, or either of you, before whom such

testimony may be taken to reduce the same to writing, and to close it up under your hand and seal directed to Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, at the city of San Francisco, as soon as may be convenient after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this fourth day of
201 June, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st.

[SEAL.] LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clerk*.

202 *Interrogatories to be propounded to Frederick Ingle.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPLAINANT,
vs.
ROBERT DENNETT ET AL., DEFENDANTS.

Interrogatories to be propounded to Frederick Ingle (a witness to be produced herein on behalf of defendants), under and by virtue of the annexed commission.

1. What is your name, age, residence, and occupation?
2. Are you one of the parties defendant in this suit?
3. Did the defendants (Dennett & Co.) have any negotiations with Mr. Laver (the complainant) in the year 1870; and, if so, state
203 briefly what was the nature of them, and in what country or countries they were carried on, and who conducted them on behalf of the defendants?
4. If you have answered that you had negotiations with said Laver in 1870 about a patent for concrete arching, give a history of that negotiation in detail, especially what took place in the United States, (if any). State also the places in which and the dates at which any of the negotiations took place, and what was done at each time and place (in chronological order). Answer fully.
5. When and where did you last see Mr. Laver in 1870?
6. Did you leave the United States for England in 1870; and, if so, when and from what port?
7. What did the negotiations between you and Mr. Laver result in?
204 8. If the said negotiations resulted in the written contract involved in this suit, state how the terms of that were arranged between yourself and Mr. Laver, and whether or not there was any preliminary verbal agreement between you and him as to the terms of the written contract; and, if so, what were the precise terms of that verbal agreement, as near as you can recollect.
9. If you have answered that there was any preliminary verbal agreement, state whether or not it contained a provision that Dennett & Co. should convey to Mr. Laver exclusive rights under said patent, either to work the invention or to sell rights to others; and whether or not such verbal agreement contained a provision that defendants should cause to be prepared a written contract conveying such exclusive rights.

205 10. If you have answered that you last saw Mr. Laver in 1870 at Albany, state (if you have not already done so) when you left Albany, and whither you went, and what you did, if anything, in regard to drawing up the written contract aforesaid.

11. Who prepared the draft of the written contract for signature and what was done with it, and whether or not it was finally signed by the parties in its original shape, and if not, what change was made, and at whose suggestion? Give the dates, and answer fully, unless you have already done so under former interrogatories.

12. Did Dennett & Co. ever receive notice from Mr. Laver or his agent to the effect that the contract was defective in that it failed to give him exclusive rights; and, if so, when did you first receive
206 that notice, and how and from whom? And if by letter, give the date of it, and tell also what, if anything, you did in consequence.

13. If you have answered that you sent a telegraphic dispatch to the effect that Dennett & Co. would correct the contract so as to give Laver exclusive rights, state when you sent it, and to whom and where; and if you have a copy of it annex to your deposition.

14. State whether or not you sent any other messages than such a telegram; and, if you did, what was it, and when sent, and to whom and where.

15. If you sent a message to the effect that Dennett & Co. would correct the contract, state whether or not defendants took any steps to do so, and what and when.

207 16. Did Mr. Laver or Thomas Fuller ever do anything towards correcting the contract; and, if so, what?

17. State whether or not Dennett & Co. had any applications for licenses under their patent in the United States after the making of the said contract. And, if so, what action, if any, did they take in regard to them, and why did they pursue that course?

(Objected to by complainant on the grounds that it is inadmissible, immaterial, and irrelevant.)

18. When does Dennett & Co.'s patent aforesaid in the United States expire?

(Objected to by complainant on same grounds as to next preceding question.)

19. Where were the other defendants during the time of your negotiations with Mr. Laver in the United States in 1870?

208 20. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer to this interrogatory.

STETSON & HOUGHTON,
Solicitors for Defendants.

Cross-interrogatories to be propounded to Frederick Ingle.

Cross-interrogatories to be propounded to the above-named witness.

I. If, in reply to interrogatory No. 8 herein, you have said that no verbal agreement on the subject-matter there named had been made, state if, in the various conversations and negotiations between yourself and Mr. Laver, it was not fully understood that any

209 sale made to complainant should include the exclusive right to use and sell the invention or patent right within such districts as should be agreed upon.

II. Would not any written contract which substantially reduced to writing the result of those conversations and negotiations have conveyed to the complainant such exclusive right?

(Objected to as incompetent, immaterial, and irrelevant.)

III. Was not the written contract referred to in your direct testimony herein prepared by your solicitors under your instruction?

IV. Did you not intend that said written contract should convey to the complainant the exclusive right to use and sell and vend to others to be sold the invention and patent right there mentioned within the districts there named?

210 V. In instructing your solicitors to prepare that written contract, did you not advise them that the same should convey to complainant such exclusive right?

VII. If you did not so advise your solicitors in express words, did you not sufficiently state to them your understanding with Mr. Laver upon that matter, or the terms of the contract which they were to prepare, to make them comprehend that such contract should convey to complainant the exclusive right mentioned?

PIXLEY & HARRISON,
Solicitors for Complainant.

Stipulation as to answers to certain interrogatories which are objected to.

It is hereby stipulated that the answers to such of the foregoing interrogatories and cross-interrogatories as are marked on the margin thereof as having been objected to shall, when offered in evi-
211 dence herein, be so offered subject to such objections; otherwise they are agreed to.

PIXLEY & HARRISON,
Solicitors for Complainant.
STETSON & HOUGHTON,
Solicitors for Defendants.

JUNE 2, 1877.

(Endorsed:) Filed 4th June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y clerk.

212 *Certificate of clerk to order interrogatories, &c.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth judicial circuit, district of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify the annexed to be full, true, and correct copies of—

1. The original order that a commission issue herein.
2. The original stipulation of counsel to take the deposition of Frederick Ingle.
3. Direct interrogatories to be propounded to Frederick Ingle.
4. Cross-interrogatories to be propounded to Frederick Ingle
213 in the therein-entitled cause, now on file and of record in my office; that I have compared the same with said originals, and

that the same is a correct transcript therefrom, and of the whole of said originals respectively.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 5th day of June, A. D. 1877.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

214 *Deposition of Frederick Ingle.*

The deposition of Frederick Ingle, a witness produced, sworn, and examined before me, George Woodford Laurance, one of the commissioners named in the foregoing commission in a certain cause now pending in the circuit court of the United States for the district of California, wherein Augustus Laver is complainant and Robert Dennett and others are the defendants, on the part of defendants taken under and by virtue of the said commission.

The above-named FREDERICK INGLE, being produced before me, the undersigned commissioner, and duly sworn, as hereinafter appears, and satisfactorily proved to me to be the Frederick Ingle named as a witness in the foregoing commission, doth, in answer to the interrogatories and cross-interrogatories to the said commission annexed, depose as follows:

To the first interrogatory he saith:

215 1. My name is Frederick Ingle; my age is 38; I reside at No. 5 Whitehall and No. 47 Grosvenor road, both in London, and my occupation is that of a building contractor and inspector of fireproof floors.

To the 2d interrogatory he saith:

2. I am one of the parties defendant in this suit.

To the 3d interrogatory he saith:

3. The defendants Dennett & Co. had negotiations with Mr. Laver, in 1870, respecting the license for working a patent for concrete arching. The negotiations took place in the spring of the year in England, and in the autumn of the same year in the United States. I conducted them on behalf of the defendants.

To the 4th interrogatory he saith:

216 4. My firm of Dennett & Co. had had correspondence with the plaintiff Laver, in 1869, respecting the introduction of our system of concrete arching in the new State capitol at Albany, for which Laver's partner, Fuller, was architect, and also respecting the granting of a license to Laver to use the patent generally in the United States. The plaintiff came to England in the spring of 1870, and examined our arching, and expressed approval of it, and repeated his wish to take the license. We said we were willing to grant it to him if suitable terms could be arranged. It was decided that I should go to the United States late in the year 1870, and continue the negotiations. I left Liverpool on July 19th, 1870, and arrived in Boston on August 15th. The plaintiff was not there, and after a visit of a few days to New York, I joined him at his house near Albany, where I stayed a week or

217 two at most. Little negotiation occurred during this visit, as it was considered desirable that I should first investigate the question of sufficient supply of gypsum cement on that side the Atlantic. With this view I went to Montreal, & made some experiments in burning gypsum. I then returned to Albany and stayed about a week or

10 days with the plaintiff. During this visit I constructed an experimental arch with gypsum which I had brought from England, and little further conversation passed between the plaintiff and me bearing on those negotiations. The plaintiff and I went to New York, and the neighboring city of Newark, New Jersey, where he introduced me to a Mr. Stent, an architect, and after the plaintiff's return to Albany I constructed for Stent's satisfaction a specimen arch, as it was hoped by the plaintiff that Stent would co-operate, and take a subagency for working the patent under the plaintiff. After
218 leaving New York I went to Philadelphia, Washington, Pittsburgh, and Niagara, and then returned to Albany, taking in my way the gypsum districts of Syracuse, Rochester, and other places in the north part of the State of New York, and ascertained that the gypsum cement could be procured from thence in sufficient quantities and on suitable terms. I visited several quarries and had interviews with managers of gypsum works. On reaching Albany I tested with weight the arch which I had constructed there some weeks previously, and with results which were satisfactory to the plaintiff. We had a good deal of conversation about the proposed licensed during this visit, but no agreement was arrived at. Amongst other proposals made by me to the plaintiff was one that he should purchase for lump sums the rights out and out for the several sections into which it was pro-
219 posed to divide the country. The sums which I proposed were as follows: For section A, £3,250; for section B, £2,750; for section C, £2,250, and for section D, £1,750; the total being £10,000. The plaintiff, however, declined to entertain the idea of purchase out and out, and seemed chiefly anxious to have a considerable preliminary time for working before he became liable for any minimum royalties, and I was willing on behalf of my firm to agree to this on condition that he did his best, and that during that preliminary time he should pay to my firm only such royalties as he might receive. Eventually it was arranged that I should go to New York and have a draft agreement proposed by our solicitors, embodying such terms as my firm would accept. The draft agreement was accordingly prepared in New York, and sent to the plaintiff for his approval. He returned it
220 signed by him, but with 2 alterations made by him; one was clause 11. This alteration I regarded as unimportant. The other alteration was the erasure of clause 12, to which I would not consent. I therefore had the agreement prepared afresh in accordance with my determination, and returned it to the plaintiff and wrote him the same day (October 29th), explaining my reasons and telling him that I should leave New York on the 2d November. A counterpart of this fresh agreement was signed by me before I left New York, and our solicitors were to exchange the same with the plaintiff when he had signed his counterpart. I left New York on 2d November, and the agreements were exchanged about the 20th November, to the best of my belief, the plaintiff having previously signed his counterpart.

221 In answer to the 5th interrogatory he saith:

5. I last saw plaintiff about the 20th October, 1870, in Albany, but I cannot fix the precise date.

In answer to the 6th interrogatory he saith:

6. I have already answered this interrogatory.

In answer to the 7th interrogatory he saith:

7. The negotiations between me and the plaintiff resulted in the written agreement signed by us as mentioned in my answer to the 4th interrogatory.

In answer to the 8th interrogatory he saith:

8. I have already stated how the terms were arranged between
222 me and the plaintiff. There was no preliminary verbal agreement between us, but only conversation, and no precise arrangement. It was decided that I should send a draft agreement to the plaintiff for his approval from New York, which was done, as I have before stated.

In answer to the 9th interrogatory he saith:

9. I have already answered that there was no preliminary verbal agreement.

In answer to the 10th interrogatory he saith:

10. When I left Albany about the 20th October I went straight to New York. I have already stated what I did there in regard to drawing up the written contract.

In answer to the 11th interrogatory he saith:

223 11. The draft of the written contract was prepared by Santvoort & Hauff, of New York, who were the solicitors to my firm, and was sent to the plaintiff for approval, and certain alterations were made by him and dealt with by me as before stated, and the contract was not finally signed by the parties in its original shape.

In answer to the 12th interrogatory he saith:

12. My firm first received notice from Fuller, the plaintiff's partner, that he (Fuller) had discovered that the contract did not grant him exclusive rights, and that negotiations for the sale of the patent rights for the State of Massachusetts were in danger of falling through. This notice was in a letter dated 15th April, 1873, and I received it in due course of post about the end of the month. My firm telegraphed
224 to him on the 6th May, 1873, as follows: "Dennett will alter agreement, giving Laver exclusive rights." My firm also wrote to Fuller on 5th May, 1873, to the same effect as the telegram, and stating that we would instruct our solicitors in New York to prepare a fresh agreement, giving the required powers to the plaintiff. We also wrote to the same effect to the plaintiff on 9th May, 1873, he having made similar complaint in a letter from San Francisco, dated 26th April, 1873. In our replies to both Fuller and the plaintiff we pointed out that the agreement did not contemplate the sale of any portion of the patent rights out and out, but that we were willing to give the necessary powers for him to effect a sale, but we considered the agreement as it stood sufficiently protected him for working the patent.

225 In answer to the 13th interrogatory he saith:

13. I sent the telegram above mentioned to Fuller at Albany. I have what I believe to be a true copy of it, which will be annexed to this deposition.

In answer to the 14th interrogatory he saith:

14. I sent no other message than the above-mentioned telegraphic message and the letters referred to in my answer to the 12th interrogatory.

In answer to the 15th interrogatory he saith:

15. My firm wrote to our solicitors a letter dated 10th May, 1873, directing them to communicate with Fuller and the plaintiff with a view to drawing up a fresh agreement, giving the plaintiff the exclu-
226 sive rights which he required and to exchanging the new agreement for the old one.

In answer to the 16th interrogatory he saith:

16. Neither the plaintiff nor Thomas Fuller ever did anything so far as I know towards correcting the contract.

In answer to the 17th interrogatory he saith:

17. My firm had many such applications, and we always referred the parties to the plaintiff, or Fuller, and gave to the plaintiff, or Fuller, notice from time to time that we had referred the parties to them. We pursued that course because we considered the plaintiff to be acting under the agreement as sole licensee.

In answer to the 18th interrogatory he saith:

227 18. The patent will expire on the 13th August, 1880.

In answer to the 19th interrogatory he saith:

19. The other 2 defendants were both in Nottingham, in England, during my negotiations with the plaintiff in 1870.

In answer to the 20th interrogatory he saith:

20. We gave the plaintiff every opportunity of examining the agreement which was prepared, and of taking legal advice upon it if he wished, and that he did carefully examine it before final signature is proved by the fact that he altered one clause and wished to erase another. For several years after the agreement was signed we rendered to the plaintiff and his partner, Fuller, all the assistance
228 we could. We arranged upon drawings sent to us by them details of arching and girders, and gave them voluminous instructions for carrying out the work. We sent to them a great number of illustrated pamphlets for circulation. We were constantly pressing the plaintiff to push the matter energetically, and complaining of his want of progress, and that by his neglect the splendid opportunities which the fires in Boston and Chicago afforded him for extensively introducing the work were being lost. From the date of the contract to the present time we have always acted in good faith upon the footing of the plaintiff having exclusive rights to work the patent.

In answer to the 1st cross-interrogatory he saith:

1. I have already said that there was no verbal agreement be-
229 tween me and the plaintiff but only general conversation, but it was intended by me that no other person than the plaintiff should have power to deal with the patent so long as the plaintiff fulfilled his part of the contract, and I believe that the plaintiff expected as much. It was not understood by me that the agreement was to recognize any question of sale, inasmuch as I had made offers to sell each or any of the sections to the plaintiff out and out, but he distinctly declined to purchase or to have such matters made part of the agreement.

In answer to 2nd cross-interrogatory he saith:

2. I cannot tell. As stated in my answer to the 8th interrogatory it was arranged between the plaintiff and myself that I should have an agreement prepared embodying the terms which my firm could
230 accept and send it to the plaintiff for examination and approval.

In answer to the 3d cross-interrogatory he saith:

3. It was prepared subject to the plaintiff's approva', as before stated.

In answer to the 4th cross-interrogatory he saith:

4. I did intend that the plaintiff should have exclusive right to work the patent, and to license others to do so, but I did not intend that he should have power to sell the invention and patent-right for any of the districts named in the contract out and out.

In answer to the 5th cross-interrogatory he says:

5. I several times saw my solicitor, Mr. Van Santvoord, on the
231 subject of preparing the draft agreement, but I cannot recollect giving any special instructions to him upon the question of exclus-

ve rights, but I know that my intention was that he (the plaintiff) should have exclusive rights to work the patent so long as he fulfilled his part of the contract.

In answer to the 6th cross-interrogatory he saith:

6. I cannot recollect giving to my solicitor any special instructions on the question of exclusive rights.

FRED'K INGLE.

I, the undersigned George Woodford Lawrance, one of the commissioners named in the foregoing commission attached hereto, hereby certify that, pursuant to the foregoing commission, I caused the witness whose testimony is hereinbefore set forth to attend before
232 me, on the 23d and 26th days of November, 1877, at No. 7 New Square, Lincoln's Inn, London, and, upon his corporal oath first taken before me, I diligently examined him on the direct and cross-interrogatories annexed to said commission, and I caused the said testimony to be reduced to writing, and then I carefully read the same to him and he said it was correct and true, and he signed the same in my presence. And in all respects in taking this deposition I have fully and exactly complied with the directions in said commission, and with all the requirements of law.

In witness whereof I have hereunto set my hand at No. 7 New Square, Lincoln's Inn aforesaid, this 26th day of November, 1877.

GEORGE WOODFORD LAWRANCE,
Commissioner as aforesaid.

233 This is the copy of the telegram referred to in the answer to the 13th of the interrogatories annexed to the said commission.

G. W. LAWRANCE,
Commissioner.

MAY 6, 1873.

8 4.

FULLER, *Architect, Albany, New York:*

Dennett will alter agreement, giving Laver exclusive rights.
Pd. £3 15°.

ROB'T DENNETT & CO.,
5 Whitehall.

(Endorsed:) Opened by written consent of counsel and filed 18 December, 1877.

L. S. B. SAWYER, *Clerk.*

234 *Letter: A. Laver to Fred'k Ingle.*

ALBANY, N. Y., *6th Nov'r*, 1870.

FRED. INGLE, Esq'r.

D'R SIR: On my return from Boston I found y'r letter & returned agreem't. Your explanation to clause 12 being so far satisfactory, I have lost no time in sending the agreem't duly signed & witnessed to your sol'r, New York. I regret Mr. Fuller sho'd have written you so positively, for on perusing y'r letter I pointed out to him y'r reference to the main covenant in the agreem't, viz, the payment of minimum & maximum am'ts, whereas I took the agreem't to read as though on any slight pretence whatever you had power to give me notice to quit at 30 days' notice; this was before I rece'v'd your explanations.

You will readily see how this would have operated against all our interests, as I told you when here that I sho'd like to feel that I
235 was working for a good cause both for myself as well as for yourselves, and that my exertions would not in a moment be rendered fruitless by being supplanted by others; if you remember, in England, I always asked you for protection in this respect. I leave for San Francisco with my wife on the 20th inst., & shall stay about a month; please write me as soon as you get this to the enclosed address. I herewith send you a description of our design written by Fuller. You will see your firm's name figuring there, & I learn to-day that fire-proofing is beginning to be employed in San F. I shall know more after my visit. I have also sent you photos. of the designs with specification; distribute them to friends Edgar, Carpenter, & others, & if they are worthy of notice I will send you more. I shall take up my residence in N. Y. so soon as I return from San F.

236 Please make my best remembrances to Mr. & Mrs. Dennett & family, & believe me,

Yours very faithfully,

AUGUSTUS LAVER.

P. S. Best regards to all y'r London acquaintances that I met so pleasantly when there; shall be over again with comm'rs of capitol ab't the end of next year. I see several items in the preliminary agreem't mutually agreed to between us left out in the one you sent for signature.

237 *Letter: Rob't Dennett & Co. to A. Laver.*

APRIL 26, 1871.

DEAR SIR: We enclose you a copy of letter rec'd from Mess. Fraser, Farness & Hewett, of Philadelphia, with our reply. Will you communicate with them?

We hope you received the descriptive papers or instructions we sent on Feb'y 28, & also the drawings. Have you got any work in immediate prospect? We shall be glad to hear of a start being made with the arching. We are very busy here, having a good deal of work going on in the north of England, & some very large mills coming on at Carlsyle, Bradford, etc. We see you' S. Francisco design appeared in the Builder last week. Edgar was somewhat disappointed, as he thought you would send it to the Architect. Have you or Mr. Stent been able to do anything in Bullivant's works? He sometimes asks me about it.

238 Lence Adams, the patentee of the hinges, wrote to say that his agent ordered him not to send any samples over until the patent for the U. S. was complete; we have not heard anything more from him. Hoping to hear from you shortly that something is showing in the arching,

We are yours truly,

ROB'T DENNETT & CO.

AUG. LAVER, Esq'r,
45 *N. Pearl st., Albany, N. Y., U. S.*

P. S.—Kind regards to Mrs. Laver, & to Mr. & Mrs. Fuller.

F. I.

239 *Letter: Fred'k Ingle to A. Laver.*

DEC. 30, 1871.

AUG. LAVER, Esq'r:

DEAR SIR: A Mr. C. P. Thomas, of 458 Wabash avenue, Chicago, has written to us for particulars of the fire-proof floor, for which he says there is now a great demand in Chicago.

I have sent him a pamphlet & referred him to you.

Will you write to him? & I shall be glad to hear how you are progressing in that quarter & elsewhere.

Yours, truly,

FRED'K INGLE,
For R. D. & CO.

SAN FRANCISCO, U. S.

P. S.—Compliments of the season to yourself & Mrs. Laver.

240 *Letter: Fred'k Ingle to A. Laver.*

OCT. 5, 1872.

AUG. LAVER, Esq'r,
San Francisco:

DEAR SIR: You will be surprised probably at my not having replied sooner to your letter in which you reported the negotiations with your friend for the disposal of section D. I hope you have been able to complete the affair at the price named—£1,750 0 0. It is a low price (compared with section A for instance), but it was assumed at the time the offer was made that operations would be commenced in section D last of all. If, however, they can be begun at once all the better for the purchasers, as they will get a longer unexpired term to work the patent in than was anticipated.

I hope you are still getting on well in San F. We are very very busy here, as usual. In fact I work so hard individually and am
241 so harassed with a multiplicity of affairs that sometimes feel inclined to say cui bono. However, I suppose we shall have to keep pegging away all the same. I heard from Hopkins a few days ago. He reports that he got gypsum well burnt from Nova Scotia, & they were getting on well with the arching of the bank, and so his first trial of the patent seems very successful so far, 11 feet spans too. You were mistaken about the Building News having published a view of the S. F. city hall. I went to see them several times & insisted they had published the perspect, which they always denied. At last I induced them to look thro' back numbers, but it could not be found. It then struck me you might have meant Builder and sure enough I found the view in one of their vols. I was a long time in getting at Mr. Godmen, the editor, & longer still in getting any answer out of
242 him as to whether he w'd publish the plans. A week or two since he politely declined. I wanted to get this matter settled before writing to you again, hence my long silence. I sent a sample of our ordinary gypsum cement in card-board box by post to you a week ago. Kind regards to Mrs. Laver & yourself.

Yours truly,

FRED'K INGLE.

243 *Letter: Fred'k Ingle to A. Laver.*

FEB'Y 5TH, 1873.

AUG. LAVER, ESQ'R:
Architect, Office of City Hall Commissioners, San Francisco, U. S.:

DEAR SIR: I have been expecting to hear from you again with reference to the negotiations which you were making with regard to section D.

In your letter, received some months ago, you reported that the parties were satisfied with the price we asked for the disposal of the absolute right to work the patent in section D, and that you hoped to send us in your next letter a remittance for the same.

I should be glad to hear how the matter stands, as time is now getting on and it is very desirable both for your interest and our own that some definite arrangements should be made for pushing forward the working of the patent, not only in section D, but in the other sections.

244 There seems to have been an excellent opening in the States lately, consequent on the large fires in Chicago & Boston. Most of the important buildings in those cities will doubtless be constructed with fire-proof floors, and the serious losses resulting from those fires should stimulate such a business as ours (if properly introduced & well pushed) in all the other cities of the Union. We received two or three weeks since a letter from a builder in Chicago (which we enclose), with reference to the proposed adoption of our system in some competition drawings, which an architect or friend of his is preparing for the new state-house there. I shall send him a pamphlet and tell him that we have given his name to our licensee in the States, who will communicate with him, but I shall not mention your name to him in this letter, as you

245 may possibly be preparing designs for the same building, & may prefer to communicate with him through your own agents, or to turn the matter over to the comp'y you spoke of if you have completed arrangements with them.

With respect to the agreement between yourself and our firm you are of course aware that you became liable after Sept. 30th, on last year, for the minimum amount of royalty on sections A & B, which was stipulated to paid quarterly. This would make £125 due on each of those sections (or £250 in all), on Dec. 30th, 1872; another £250 will be due on those sections on March 30, 1873, when royalty will begin to accrue also against section "C," so that £375 would be due June 30th, 1873, for the previous quarter, and the last-named sum for each succeeding quarter until & including March 30th, 1874, when

246 royalty will begin to accrue against section D (unless it is disposed of absolutely, as suggested in your last letter), and on June 30, 1874, there would be £500 due for the preceding quarter on the 4 sections, and the like sum each quarter until the expiration of the license. These figures are assuming that the amount of work done in any quarter does not exceed one thousand squares per annum in each section. For any amount executed over & above that area a royalty of 10s. per square would be due to us in addition, until the maximum of £1,000 per section per annum was reached. But I need hardly recapitulate these facts, as they are clearly stated in the agreement. I should, however, be glad to hear from you concerning the amount due up to Dec. 30, 1872, viz, £250, & with respect to the sale of section "D."

The last time I heard from Mr. Hopkins he had nearly com-

247 pleted the arching of the Merchants' Bank in Montreal, and although he adopted wide spans there the experiment was very

successful & gave him great satisfaction. He had got the gypsum burnt in Nova Scotia.

We still continue very busy here, both in London & all over the country; we have some large mills & public buildings in the north, and (although it is hard winter) I have 3 large jobs, as well as other smaller works, going on in town. We had a good experiment, about a month ago, with fire on an arch. It was constructed so as to form the roof of a furnace 10 ft. ½ 0x8–0 and 3′ 6′ above ground; a severe fire was kept up in the furnace for 5 hours, the whole of the interior of the walls and underside of arch being red hot. There were shavings, matches, and gunpowder scattered on the top of the arch all the
248 time, none of which ignited. Indeed, the hand might be laid without discomfort on the top of the arch at any time during the fire. When at its greatest heat the arch was deluged with water, above & below, and immediately tested with a weight of 5 tons, or 4 cwt per sup'l foot. By careful measurement a slight deflection of only ⅛th inch was apparent, after the load had remained for some days, & this was due, not to the burning, but to a slight yielding of one abutment, which was a temporary wall & not very strong. The arch was of ordinary dimensions, 8 feet span, 8 ins. rise in soffit, and five thick in crown. We have just got from the surveyors the schedules of our law courts' work. The estimates have to be delivered a month hence. Our work is all embodied in the contract drawings, & it is provided in the specifications that it is to be executed by us.

249 Mr. Dennett continues tolerably well, & wished to be remembered to you. He (as well as myself) is anxious to see some tangible results of our patent in the United States.

Hoping to hear from you by return mail, & with kind regards to Mrs. Laver & yourself,

I am, yours very truly,

FRED'K INGLE.

250 *Letter: Fred'k Ingle to Thos. Fuller.*

FEB'Y 27, 1873.

THOS. FULLER, Esq'r,
Architect, 45 North Pearl st., Albany, N. Y.:

MY DEAR SIR: I duly rec'd yours of 3d inst. I have to apologize for my neglect with regard to the plans of the capitol you sent me. When they were received I was working almost night & day on the new law-courts' plans & was so engaged for some time afterwards. I found that it was quite impossible for me to do anything with them in time for you to make your arrangements for the iron last season; & even if I had returned them at once, I think you hardly could have done so. I therefore intended to send them back to you early this year, & I will take the earliest opportunity of getting them complete, & return them; but our business has increased so rapidly this last year that I have got deeper and deeper into arrears. Nevertheless I ought to have written to you. I have had occasional cor-
251 respondence with Mr. Laver. I was very pleased (& so was Mr. Dennett & all our friends) with Professor Crafft's experiments. I am having some copies printed & shall forward a few. I sent you a packet of pamphlets by last post, & another to Col. Seaver. I am glad to hear of the arrangements made in Boston for introducing the work. I had a letter a day or two since from Col. W. W. McKinn, which I reply to by this post. There would be no difficulty, I think, in men being sent

out if required, but Col. McKinn is not altogether clear about the advisability of this step. The chief thing is to make arrangements about procuring & burning the gypsum. Hopkins got his last summer from Nova Scotia, & had it burnt there. When he last wrote, the
252 arching at the Merchants' Bank was nearly complete, & was very successful. The spans there were wide—almost wider than I liked for a trial job. The great point is to get the stone well calcined, as explained in the "Instructions." The book you sent me is nicely got up, but I had no idea you meant to print those instructions. They answer the purpose very well, but require a little polishing for the press. I notice a few errors, e. g., angle-irons, in one case, is called angle-arms, & the crush-room at H. M. Theatre is called brush-room, & the sketches are somewhat crude, but on the whole it forms a very good practical manual. Send me another copy or two, & I will return one with marginal notes. I don't know what the patent is you refer to, having highly-burnt gypsum for an ingredient. Can you get me a specification of it, or some more detailed account, & the name of the patentee? I can get no photo's of the Edinboro' Cathedral. The
253 design of Sir S. S. Scott's is being altered, the nave lengthened, & two western towers added, as well as the original central one. The Builder, Building News, & Architect have been full of illustrations, for the last few weeks, of Scott's, Street's, Barge's & other designs. As I believe you have those papers regularly, I suppose none of them would be any good to you. If I can get any illustration of Scott's new design I will do so. It would be quite safe to groin a church 50 feet span with our concrete, but suitable buttressing would be required; I don't think so much buttressing as for stone vaults, but it w'd be so difficult to formulate the difference that I should treat them in the same way. The barrel vault at the foreign offices is 36 feet span, & quite close to the roof, & no ties or extra thickness of walls—only the same as the other outer walls of the same building. The centres stood a long time, however.

254 I wrote at length to Mr. Laver early this month ab't the slow progress of the patent in the States up to now. I hope we shall make a move on. I feel sure a great opportunity will otherwise be lost. I gave him an account of a good test as to fire which we made on our arch about 2 months ago. I will, if possible, annex a report before closing this.

With kind regards to yourself, Mrs. Fuller, & family, I am,

Yours, most truly,

FRED'K INGLE.

255 *Letter.—Fred'k Ingle to A. Laver.*

MAY 9, 1873.

AUG. LAVER, Esq'r,
New City Hall, San Francisco, Cal'a, U. S:

DEAR SIR: Yours of 29th March came duly to hand, with enclosures, & I delayed answering it for a week or two, as I was expecting to hear from Mr. Fuller. I have now heard from him, & you no doubt know to what effect.

He complains of the agreement not giving you exclusive rights. I think it expressed enough for the purpose contemplated at the time, & you were satisfied with it. At any rate we intended to give you exclusive rights, & have in all good faith acted up to that intention, inasmuch as we have refused many offers of agency since Oct., 1870, the

date of our agreement with you. I suppose Mr. Fuller will send
256 you the letter I wrote him in reply; at any rate I will write him by this post a line requesting him to do so; then you will see exactly what I propose to do. I may say that I have also by this post instructed Mr. Van Santvoord, our solic'r in New York, to prepare full agreements giving you exclusive rights, & send them to each of us to be re-signed & exchanged, when this is done; they will supersede the others, & I hope will be sufficient for Mr. Fuller's purpose.

Speaking generally, our view with regard to the matter is this (I mean Dennett's & my own), that we gave you a liberal margin of time to make preliminary arrangements, & asked for only a moderate royalty on each section. You had the option of holding or abandoning up to certain dates. If you had decided to surrender we should have been losers of 2 years of valuable time, & sh'd have had all our work to
257 begin over again. As you elected to keep the patent-right you could hardly expect us to forego the just claims for which we stipulated after such very liberal reservations in your favor. We do not suppose for a moment that you expect this. We do not wish to press you hardly in the matter, but it is really time now that some tangible return was made to us; of course if the section B is sold at once and the money paid over, as we hope it will be, we forego any claim for royalties already due on that section.

You will see that we have put the price of this £250 lower than our original offer, which was £2,750; we have agreed to take £2,500 cash down; with regard to the other sections, we hope you will be able to complete the sale of section D as you state, as this seems the most simple way of dealing if you can get somebody with energy & a little
258 capital in each section to take it up, but we do not mind how you deal with the matter in any section, as long as we get something like the moderate return we have asked in one shape or the other, viz, as royalties or cash down.

We are much gratified with the report you have sent us ("Proff. Crafts" & the Boston Chapter of Arch'ts), & agree with you that very good preliminary work has been done, but it is really time now that we began to realize cash profit from the patent.

With kind regards to Mrs. Laver, I am

Yours, very truly,

FRED. K. INGLE.

P. S. Let the agreement be acknowledged by a notary.

259 *Letter: Fred'k Ingle to A. Laver.*

MAY 29, 1873.

DEAR SIR: Yours of 26th April was duly rec'd. I had heard to this effect from Mr. Fuller, & wrote in reply to him fully, & also to our solicitor, Van Santvoord, of Park place, New York, instructing him to alter the agreement as you wished. I asked Fuller to send my letter on to you so that you might see exactly the view Dennett & I took of the matter.

There need be no difficulty in the matter, & Mr. Van Santvoord will doubtless arrange the whole matter to your satisfaction. I am glad to hear the system is so well spoken of in Boston.

I hope by this time Fuller has been in communication with Van

Santvoord, & is in a fair way for completing negotiations with the Boston Co'y.

Yours, truly,

F. INGLE.

260 AUG. LAVER,
San Francisco:

What about section D? When are you likely to complete the sale of it?

261 *Letter: Tho's Fuller to Fred'k Ingle.*

ALBANY, N. Y., *Ju'e* 23, 1873.

F. INGLE, Esq'r (*Dennett & Co.*):
Whitehall, London, England:

DEAR SIR: I should have written before, but have been daily expecting Mr. Laver here. Your last letter was duly forwarded him to San Francisco. The action or rather objections made by parties may have seemed trivial to you; different opinions are entertained here. Your decision not to protect the patent renders it valueless, even if it could not be infringed. The duration of the patent is so short no parties would dream of paying large sums for it. Acting as Mr. Laver's attorney, I did the best I could to dispose of it for New England States. That is now abandoned unless the patent can be ex-
262 tended. Enclosed is a letter (copy) from the attorney of the parties who have now undertaken to work it upon royalty. At the last meeting of the commissioners of the new capitol on the 10th instant it was decided to adopt the "Dennett" system, as recommended by the architect, but there is no prospect of laying any floor this season. I reported to the board that as the floors are completed a royalty of ten shillings per square will be payable to Mess. Dennett & Co., of London. I have informed Mr. Laver that I cannot take any further trouble in the matter, but whenever I have an opportunity I will not hesitate to recommend the system. Notwithstanding your opinion to the contrary, I am quite sure that every exertion has been made in this locality to introduce the patent.

263 Owing to the financial difficulties in Boston, it was utterly impossible to made greater progress there. I believe from all I heard that Mr. McKinn is a gentleman in every way to be relied on. I heard from Mr. Laver by telegram on Friday that he could not leave at present, so his arrival here is uncertain.

Will you be kind enough to send me as soon as possible an analysis of the English gypsum; a report has been started that the gypsum here is not equal. I heard from Mr. McKinn (June 20), in which he states, "I feel encouraged & believe my efforts will bring about good results. I understand that I have created a lively interest among the architects; but I find several of them are very timid and apprehensive that we have not as good gypsum here as is found in England."

Please let me know as soon as possible if the patent can be extended, as those parties in Boston are very anxious to know.

With best wishes,

Yours, truly,

THO'S FULLER.

264 *Letter.—Fred'k Ingle to Thos. Fuller.*

JULY 5, 1873.

THOS. FULLER, Esq.,
45 North Pearl St., Albany, N. Y., U. S.:

DEAR SIR: Please read the enclosed & forward it to Col. McKein. It is in reply to a few questions he asks me.

I expected to have heard from you before now in reply to my letter & telegram.

I wrote to our solicitor at same time as to you & I rec'd reply from him long ago. He acknowledged receipt of our instructions & said he w'd act upon them at once. We shall be glad to hear what is being or has been done. I hoped you w'd have written on receipt of my telegram.

Yours, truly,

FRED'K INGLE.

How do Mr. Laver's negotiations for section D stand?

265 *Letter.—Fred'k Ingle to Thos. Fuller.*

JULY 26, 1873.

THOS. FULLER, Esq.:

DEAR SIR: I enclose a letter for Col. McKein, of Boston; will you kindly forward it. You have not yet informed me if he is your or Mr. Laver's authorized agent, and if I shall not be prejudicing your interests in any way in corresponding with him direct. I am anxious not to do anything contrary to the letter or spirit of our agreement. I have no doubt it is all right, but I think you ought to tell me if I have your authority to write direct to Col. McKein, or if you would prefer letters still to be forwarded thro' yourself. I do not wish to be discourteous to him or you; only let it be properly understood.

I trust the explanations in my last letter have removed the
266 doubts of your friends & their solicitors. Are you sure those objections are not being raised one after another with a view to lowering the price?

I trust that you will be able to state at a very early date whether any of the sections are to be purchased out and out or not. If not we must ask for the terms of our agreement with Mr. Laver to be kept with regard to return of royalties. Has Mr. Laver returned yet from San Francisco? If not, kindly send him this letter or state its contents.

Yours, truly,

FRED'K INGLE.

45 N'th Pearl St., Albany, N. Y.

267 *Letter.—Rob't Dennett & Co. to Thos. Fuller.*

NOV. 7, 1873.

THOS. FULLER, Esq'r.,
Arch't, 45 North Pearl St., Albany, N. Y., U. S.:

DEAR SIR: Col. McKein has written to us asking us some questions relative to some arching proposed to be carried out by him in Boston.

We have asked once or twice if you gave us authority to correspond with him direct, but you have never formally authorized us to do so. We presume, however, from remarks you have made in some of your letters that he is your responsible agent in Boston, & as he wished us in his letter to reply direct to him as early as possible, as time was pressing, we have done so, but we have informed him (as you will see by copy of our letter to him enclosed herewith) that we cannot give him our permission direct to carry out the work, but that he must get
268 it from Mr. Laver (or yourself as Mr. Laver's representative in the matter).

We are rather surprised not to have heard from Mr. Laver or yourself for so long a time. You will recollect that in our last correspondence we reminded you of the royalties then due under the agreement. They have, of course, since been accruing.

Are we to understand that all negotiations for the sale of sections New England States & Western States respectively have dropped through. If so, we must press for payment of royalties due up to last quarter, as it would be quite unreasonable to expect that the matter should stand over any longer.

Through the exclusive license granted to Mr. Laver we have been prevented from treating with any other parties, although we have had several offers.

We cannot therefore consent to forfeit any part of our past
269 claims under the agreement. Is Mr. Laver in Albany or San Francisco? If the latter, please forward this to him. We should have written direct to him if we had known his address.

Please ask him to consider this letter as written to himself as well as to you. We have been very patient in the matter & must now really have some settlement of the accounts as far as they have gone.

Yours, very truly,

P. ROB'T DENNETT & CO.
FRED'K INGLE.

270 *Stipulation as to answer.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER, COMPL'NT,
v.
ROBERT DENNETT & AL., DEF'TS. } In equity.

It is stipulated and agreed that the answer of the defendants in this suit, already taken before I. Nunn, the vice & deputy consul-general and notary public ex officio of the United States at London, and a commissioner to administer oaths in the supreme court of judicature, shall have the same force & effect as if it had been duly taken under a dedimus potestatem issued out of this court, or as if sworn to before a judge of a court of the United States within the territory of the United States.

PIXLEY & HARRISON,
Solicitors for Complainant.
271 BARSTOW & HOUGHTON,
Sol'rs for Def'ts.

Dated May 31, 1876.

(Endorsed:) Filed 6 February, 1878. L. S. R. Sawyer, clerk.

272 *Stipulation as to certain copies of letters, &c., the originals of which are offered in evidence.*

Circuit court of the United States, district of California.

AUGUSTUS LAVER
v.
ROBERT DENNETT ET AL. } No. 1422.

It is stipulated that certain copies of letters and a telegram between the parties hereto or their agents, which copies are identified by the signatures of the solicitors of both parties, may be offered in evidence in this cause at or before the hearing; and it shall be unnecessary to prove the same in any way. And it is admitted that said copies shall have all the effect of the originals, and that they are such letters and telegram as they purport to be, and were all written at the times and places at which they respectively bear date, and received in the usual course of mail and telegraph by the persons to whom they are addressed.

273 Otherwise said copies to be subject to all legal objections as to competency and relevancy.

May 2d, 1877.

PIXLEY & HARRISON,
Solicitors for Complainant.
STETSON & HOUGHTON,
Solicitors for Def'ts.

(Endorsed:) Filed 6 February, 1878. L. S. B. Sawyer, clerk.

274 *Order allowing an appeal.*

At a stated term, to wit, the July term, A. D. 1878, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the fourth day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Lorenzo Sawyer, circuit judge.

AUGUSTUS LAVER
vs.
ROBERT DENNETT ET AL.

On motion of Robert Harrison, esq'r, solicitor for the complainant herein, it is ordered that an appeal to the Supreme Court of the
275 United States from the decree made and entered herein on the eighteenth day of June, A. D. 1878, of the February term, A. D. 1878, of this court, be and the same is hereby allowed. And it is further ordered that a certified transcript of the pleadings, depositions, stipulations, and proceedings in the above-entitled cause be forthwith transmitted to the Supreme Court of the United States, upon the appellant giving a bond in the sum of five hundred dollars.

276 *Bond on appeal.*

In the Supreme Court of the United States of America.

AUGUSTUS LAVER, COMPLAINANT AND APPELLANT,
vs.
ROBERT DENNETT, COLTON MAW, AND FREDERICK INGLE, defendant' and appellees.

Know all men by these presents that we, Augustus Laver, as principal, and William Curlett and Thomas Loughran, as sureties, are held and firmly bound unto Robert Dennitt, Colton Maw, and Frederick Ingle in the sum of five hundred dollars, to be paid to the said Robert Dennitt, Colton Maw, and Frederick Ingle, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of
277 our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this 6th day of November, A. D. 1878.

Whereas the above-named Augustus Laver has taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the above-entitled action by the circuit court of the United States in and for the ninth circuit and district of California;

Now, therefore, the condition of this obligation is such that if the above-named Augustus Laver shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

AUGUSTUS LAVER. [SEAL.]
WILLIAM CURLETT. [SEAL.]
THOMAS LOUGHRAN. [SEAL.]

278 Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss:

William Curlett and Thomas Loughran, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars exclusive of property exempt from execution and over and above all debts and liabilities.

WILLIAM CURLETT.
THOMAS LOUGHRAN.

Subscribed and sworn to before me this 6th day of November, A. D. 1878.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, District of California.

279 (Endorsed:) I approve both the form of the within bond and the sufficiencys of the sureties thereon.
(Signed) LORENZO SAWYER,
U. S. Circuit Judge, 9th Circuit.

Filed November 7, 1878. L. S. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

280 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United

States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing two hundred and seventy-nine written pages, numbered from 1 to 279 inclusive, together with Complainant's Exhibit No. 1 to deposition of A. Laver (a printed pamphlet), are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same constitute the transcript on appeal to the Supreme Court of the United States therein.

Witness my hand and the seal of said circuit court this sixth day of September, A. D. 1879.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

(Indorsement on cover:) No. 268. Augustus Laver, appellant, vs. Robert Dennett, Colton Maw, and Frederick Ingle, copartners under the name and style of Robert Dennett & Company. California, C. C. U. S. Filed 27th September, 1879.

REC. 268—6

IN THE

Supreme Court

OF THE

UNITED STATES.

AUGUSTUS LAVER,
Appellant,

v.

ROBERT DENNETT, ET AL.,
Appellees.

Appellant's Brief of Points and Authorities.

This is a suit in equity to cancel a written instrument, and to enjoin an action at law upon it.

Issues of fact are substantially eliminated from the case. It appears that appellees, owning a patented process for the construction of concrete arches, negotiated with appellant for the sale to him of that process in the United States. Those negotiations were informal and protracted; the negotiators being personal friends, dealing with each other in the easy confidence of that relation[1].

[1]Trans. fols. 82, 83, 110, 217, 218.

Throughout those negotiations, one thing only—*the exclusive right to use and sell the patented process*—was to be sold to appellant, and the negotiations were upon matters of price, time and other detail[1]. Finally an approximate agreement as to terms, etc., was reached, and appellees negotiating member—Mr. Ingle—went to New York to have their solicitors there put the agreement in writing[2]. An instrument was soon after sent to appellant at Albany, who read it, made some changes as to price, etc., and, supposing it conveyed him the exclusive right to the process negotiated for, signed and returned it to appellees. Appellees thereupon caused their solicitors to re-engross the instrument, accepting some and rejecting others of appellant's amendments, and to send it again to appellant. He received, signed and delivered it to appellees' solicitors, receiving from them in return its counterpart, executed by appellees.[3]

At the time of the execution of the instruments appellees intended thereby to convey, and both parties believed that thereby there was conveyed to appellant the exclusive right to use and sell to others the patented process in the United States.[4] Appellees appear to have so instructed their solicitors. But for some unexplained reason the instrument gave a mere license, leaving in appellees

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[1]Trans. fols. 84, 112. [2]Fols. 102–3, 116, 117, 219, 220. [3]Fols. 118, 220. [4]Fols. 42–3–4, 55–6.

the power to sell like licenses to whom they saw fit.[1]

Under his supposed power, appellant expended much time and money in bringing the process into notice and favor for the purpose of making sales,[2] and finally succeeded in negotiating a sale of his largest division for $30,000.[3] Upon attempting to consummate that sale, however, it was discovered that appellant did not possess what he attempted to sell—the *exclusive* right to use and sell —and for that reason further dealing was declined.[4] This was nearly three years after the execution of the instrument, and appellant was then first advised of the vice of his instrument of conveyance.[5] About the same time came reports of other failures to sell from the same cause[6], and appellant, disheartened and hopeless[7], advised appellees that he could do nothing further with the process, and abandoned it to them[8]. This was in November, 1873, and after some correspondence with appellees, in which they expressed a willingness to execute a new instrument, conveying to appellant the exclusive rights supposed to have been granted by the first indenture.

The grant of the exclusive power to use the process, and to vend it to others for use or sale within a specified territory, is the legal equivalent

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[1]Trans. fols. 43-4. [2]Fols. 89, 90-1-2-3-4-5, 103-4-5-6-7-8, 126, 130, 158 et seq. [3]Fols. 87, 94. [4]Fol. 87. [5]Fols. 87-8. [6]Fols. 88, 89 100, 104. [7]Fol. 133. [8]Fols. 109, 157, 172, 173, 179 to 186.

of an assignment of that process. A license to use, and to license others to use, reserves to the licensor the right to equally license others. Such a license, as compared with the exclusive use of the process, is valueless, and is well illustrated in the loss of the sale for Divisions "B" and "A."[1] The large prices to be paid by appellant could be realized by him only through having complete and exclusive control of the process for use and sale. Appellant received nothing from the license actually conveyed to him, but expended about $5000 in introducing the process to the public[2].

It thus appears beyond cavil, that the instrument in question was executed by the common mistake of the parties to it. The answer expressly admits: "it to be true that complainant believ-"ed at the time he executed the said counterpart, "that it and the said indenture clearly granted "and conveyed to complainant the sole and ex-"clusive right and authority to make, use and "sell the said invention, and vend it to others to "be sold."[3] "Defendants admit that the said in-"denture did not, and does not, contain a grant or "conveyance of, or grant or convey, or purport to "grant or convey to complainant the sole or ex-"clusive right or authority to make, use or sell, "or to vend to others to be so made, used or sold "the said invention."[4] "But defendants believe it

[1]Trans. fols. 87, 88, 94. [2]Fols. 107, 158. [3]Trans. fol. 42. [4]Fol. 43.

"to be true, that said indenture was executed by "mistake on the part of complainant, in that he "believed at the time he executed it that it would "operate in law to give him exclusive rights as "aforesaid."[1] "And further answering, defend- "ants say, that at the time of the execution and "delivery of the said indenture and counterpart, "they supposed that the same was sufficient in "law to vest in complainant the sole and exclusive "right to make, use and sell, and vend to others "to be sold, the said invention."[2]

On the facts established be those admissions we rest our case.

In any aspect in which the case may be viewed, it presents a cause for relief.

I.

The instrument should be cancelled.

The instrument never had a legal existence as a contract, because:

First.—It failed to express the intention of the parties.

"A contract is not the instrument by which it "is witnessed. It results exclusively from the "consent, the *aggregatio mentium* of the parties, "without which no contract can exist."

Erwin *v.* Bank of Ken., 5 La. An. 4.
Hiriart *v.* Roger, 13 S. R. 129.

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[1]Fol. 44. [2]Fols. 55, 56.

"Where a mistake occurs as to the subject mat-
"ter of the contract, there is no assent, and of
"course no contract."

1 Story on Contracts, sec. 538.

2 Chitty's Contr. (Am. Ed.) p. 1089-90

"Where there is a mutual mistake as to a fact
"forming the basis of a contract, the contract will
"be void, although no fraud be practiced."

1 Story Contracts, sec. 539 and cases cited.
1 Parsons Contracts, *p. 475.

The mistake here is one of fact rather than of law.

1 Storys Eq. Juris., secs. 152, 153, 164 f.

Where the instrument, through the fault of the scrivener, or otherwise, fails to state the full terms of the agreement or understanding of the parties, the mistake is one of fact, which equity will relieve against.

Hunt *v.* Rousmannier, 1 Peters 1, 12.
Hartford *v.* Salisbury Ore Co., 41 Conn. 133.
Briosa *v.* Pacific M. Ins. Co., 4 Daly 246.
1 Adams Equity (Am. notes), *p. 169.

In this case the fault of the scrivener must be imputed to the appellees who employed him. They undertook to have put in writing the con-

tract so far as had been agreed upon, with such further details as to prices, etc., as they would be willing to accept. Appellant was justified, therefore, in supposing the instrument sent him to contain all the provisions agreed upon, and to scrutinize only the unsettled details. That he did so is admitted. That appellees also supposed the instrument to contain the agreement of the parties is admitted; and from this it must be inferred, that appellees properly instructed their solicitors, but that they disobeyed such instructions, and so the harm was done.

But were the mistake one of law, equity would afford relief.

Hunt *v.* Rousmannier, 8 Wheat, 211.
Wheeler *v.* Smith, 9 How, 55, 81.
Wheelons Appeal, 70 Penn. St. 410.
Hearst *v.* Pryol, 44 Cal. 235.
1 Story's Eq. Juris., secs. 119 et seq 130, 134[a], 138[g, h, i, k, l.]

"We find no case which we think precisely in "point, and are unwilling, where the *effect* of the "instrument is acknowledged to have been entirely "misunderstood by both parties, to say that a "Court of Equity is incapable of affording relief."

Ch. J. Marshall in Hunt *v.* Rousmannier. 8 Wheat, 216.

SECOND—The promise of appellant contained in the instrument is *nudum pactum*, being without consideration to support it.

1 Adams Eq. (Am. notes) * p. 188.
1 Storys Cont., 605, 606, notes.
1 Parsons Cont., p. 462 et seq.
Bliss *v.* Negus, 8 Mass. 46.

The foregoing theory of the relief to which complainant was entitled was presented on the argument of the case to the Court below. Considerable time elapsed between the argument and the decision, and at the latter time the learned Judge of that Court treated the bill as one seeking a *rescission* of the contract, and refused relief because the defendants could not be restored to the position they occupied previous to the making of the contract. Meaning that the loss of the use of the process for the two or three years during which they thought complainant had its exclusive control, could not be restored to them. Thus visiting upon complainant the consequences of the fault of defendants.

We do not think this a case for rescission. Rescission of contract necessarially presupposes a contract. Here there was no contract. Authorities already cited establish that. Again, a contract is rescinded by one or both of the parties to it; not by a Court. Finally, the bill does not pray for a

rescission, but for a cancellation on the theory first herein set forth.

The word is loosely used, however, and it may be that the Court intended to rule, that the instrument contained a contract; that it could not be cancelled while the contract existed; that only by rescission could the contract be destroyed; and that such rescission had not been, and could not be made, because defendants could not be restored to the use of their process during the time which had fled.

Accepting these premises as correct, we submit that the conclusions, nevertheless, are unwarranted.

FIRST—As to causes for rescission:

Where the consideration fails, or none, in fact, has been given the contract, *ipso facto*, is rescinded.

1 Storys Cont., secs. 605, 606, notes.

1 Parsons Cont., p. 492, et seq.

Bliss *v.* Negus, 8 Mass. 46.

Farrar v. Nightingal, 2 Cap. 639

That is practically equivalent to saying that in the absence or failure of consideration there can be no contract.

"A contract may be set aside if made for a con-"sideration which is really non-existent, but which "both parties mistakingly supposed to exist."

Adams Eq. (Am. notes) * p. 188.

Where the agreement of one party has not been fulfilled, the other has a right to rescind it, notwithstanding the fact that the first offered to fulfill it as soon he learned of the omission.

Elting M. Co. *v.* Martin, 5 Daly 417.

Or where the act or omission of the one party prevents the other from fulfilling his obligation.

Webster *v.* Enfield, 10 Ill. 298.

SECOND—As to conditions of rescission:

"The necessity of giving notice upon the rescis-
"sion of a contract, exists only where the party re-
"scinding has received some benefit or advantage
"from the contract, which he must surrender be-
"fore he can claim to rescind."

Ripley *v.* Hazleton, 3 Daly 329.

But in this case, that question does not arise; there was a notice of rescission and abandonment of contract by appellant[1] fully understood by appellees[2].

The party seeking to rescind a contract fairly made, must surrender to the other party all gains and advantages derived from the contract.

1 Story Cont. sec. notes.
1 Parsons Cont. p. 980, notes.

[1]Trans. fols. 109, 157, 179, 186. [2]Fols. 172, 173.

That is all. It would be impossible to restore the parties to the condition they were in before the contract, if the attempt were made at any considerable time after its execution.

In this case appellant received no gains or advantages from the contract[1], all his profits were losses, if we may perpetrate an Hibernianism.

And we submit that in this case it is error to suppose that appellees lost the use of their process for any period through the contract, or through any act of appellant, or at all. They *mistakingly* supposed that it was lost to them, because granted exclusively to appellant. But in fact, it was not granted exclusively to appellant, and was not lost to appellees. It remained with them always, and they always had their process, both to use and to sell, despite anything the appellant could do to the contrary. And their mistake was their own, while ours was theirs.

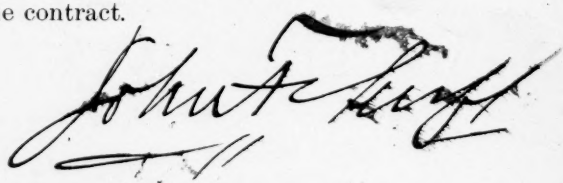
Under the views of the learned Judge below, we had an undoubted right to rescind the contract a day, or a week, perhaps even a month after its execution. Because the loss to appellees by non-use of their process was then inconsiderable. But when did it become so considerable that their fault entitling us to a rescission was cured, and no longer a fault? Is it not true, rather, that every day elapsing after the commission of the fault, and during which we remained ignorant of it, and suffer-

[1]Trans. fols. 107, 158.

ed loss thereby, increased that fault? It is startling to think that a wrong long persisted in becomes an act of virtue, entitling the perpetrator to protection and encouragement!

Equity does not exact impossibilities, and in this case will not, surely, say that we lost our right of rescission before we know that we had. or had occasion to exercise such right.

Under any view of the case, the instrument ought to be cancelled as to all obligations arising under it after November, 1873, the time of appellees receipt of appellants notice of rescission and surrender of the contract.



Counsel for Appellant.

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No. 268.

SUPREME COURT

OF THE

UNITED STATES.

AUGUSTUS LAVER,

Appellant,

vs.

ROBERT DENNETT AND AL.,

Appellees.

Appellees' Brief of Points and Authorities.

R. E. HOUGHTON,
Counsel for Appellees.

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John A. Lynch

Counsel for Appellant.

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R. E. HOUGHTON,
Counsel for Appellees.

SUPREME COURT

OF THE

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vs.

ROBERT DENNETT AND AL., *Appellees*.

No. 268.

Appellees' Brief of Points and Authorities.

STATEMENT OF FACTS.

The facts as stated in the brief of counsel for the appellant are in the main correct, but in some particulars, as we think, are not in accord with the evidence.

The negotiations between the parties began in England, and were afterwards continued in this country during several months of 1870, between Mr. Ingle, one of the appellees, and Mr. Laver.

These negotiations *not having resulted in any agreement*, Mr. Ingle, who was in haste to return to England, went to New York, and had a draft of an instrument prepared by his solicitors, "embodying such terms as his firm would agree to." He did not undertake, nor was he expected, to reduce to writing any *preliminary agreement*. In November, 1870, this draft agreement was sent to Laver, who examined it, made objections and returned it; and then after some of Laver's amendments had been accepted and others rejected, it was re-engrossed and executed by both parties, as set out in the Transcript (fol. 21 *et seq.*), one party signing one draft and the other a duplicate or "counterpart," which were exchanged.

It does not appear that any instructions were given to the solicitors on the subject of "exclusive rights."

By the terms of the agreement, as signed, Laver was to pay to Dennett & Co. certain royalties upon the work done under the patent, and was to use his "utmost diligence to introduce and work the invention" throughout the country. This was as much an essential part of the agreement as was the right given to Laver to sell licenses under the patent. Certain sums, however, called "minimum royalties," were to become due to Dennett & Co. quarterly, in any event, whether Laver worked the invention or not, and whether or not he realized anything from it.

Laver expended money in *trying to bring the invention into notice*, but he did not work it, and apparently made no attempt to perform his covenant to "use diligence to work the invention." This was one of the main points of the agreement, and the only one from which Dennett & Co. could hope to realize anything beyond the "minimum royalties" aforesaid.

The agreement was signed in November, 1870. About two years after (not three) Laver discovered that it did not give him exclusive rights. This discovery was made in February, 1873, and was not announced to Dennett & Co. till May, when they immediately, and by telegraph, offered to amend the agreement in that respect. *Laver did not avail himself of this offer*, and the $30,000 sale which he was negotiating did not fall through till the fall of 1873.

The bill charges fraud and mistake in the making of the contract. The answer denies the fraud, but admits a mistake *of law*. The charge of fraud was abandoned.

Laver's testimony, Transc., fols. 83 and 129.

The patent was to expire in 1880.

POINTS.

I.

THERE WAS NO CONTRACT BETWEEN THE PARTIES TILL THE WRITTEN AGREEMENT WAS SIGNED, IN NOVEMBER, 1870.

Their negotiations began in 1869. In 1870 Laver went to England about the business, and in August, 1870, Ingle came to the United States, and the negotiations were continued, but the parties did not reach the point of agreement. At length it was arranged that Ingle should go to New York, get such an instrument drawn as his firm would agree to, and send it to Laver for inspection.

Transc., fols. 216 to 221.

As to the preliminary negotiation, there is no conflict of testimony. Ingle went to Albany to see Laver two or three times, traveling about the country meanwhile. About October 20, 1870, Ingle finally left Albany.

Transc., fols. 216 to 221.

Up to October 20 Ingle says there was no verbal agreement.

Transc., fols. 187, 218 to 222.

Laver says that there was no absolute verbal agreement. (Transc., fol. 112.) Also, that the verbal agreement was not reduced to words.

Transc., fol. 115.

Laver says their verbal contract contained:

1. A provision for exclusive rights.

2. The exclusive right to vend the license to use.

3. The exclusive right to dispose of the patent in four districts.

4. That Laver should have exclusive right to license others.

5. Terms of payment.

6. Nothing about arbitration.

7. Nothing about surrendering the license.

8. Nothing about time of paying royalty.

9. Nothing about putting "*Dennett's Patent*," on the work.

Laver's testimony, Transc., fols. 148 to 151.

But the document finally signed was so different from this, that it is evident he refers to something inchoate. They had talked the matter over, so as to come somewhere near an agreement, that was all.

About October 20th, 1870, Ingle went to New York, and did not see Laver again. He was to have a draft of a contract made, containing such terms as *Dennett & Co.*, would accept.

Transc., fol. 219.

The first draft was made accordingly. Ingle gave no instructions to his solicitors in regard to the "exclusive rights."

Transc., fol. 231.

This first draft was the same as the contract finally signed, so far as regards "exclusive rights."

Transc., fol. 152.

This draft was read over and examined by Laver, who made two changes, not affecting the "exclusive rights" question—thought he understood it, etc.,—and then sent it back to New York with a letter, October 28.

Transc., fols. 117, 190, 220.

Ingle assented to one of these changes but not to the other, and having caused the instrument to be re-engrossed so far as necessary, sent it back to Laver, with a letter, October 29; there was no change so far as the "exclusive rights" were concerned.

Transc., fols. 220, 187, 119.

Laver read the re-engrossed draft, signed it and sent it back.

Transc., fols, 119, 191, 234.

The counterpart was signed by Ingle and left with his solicitors who sent it to Laver, when Mr. Laver asked for it.

Transc., fols. 220, 194, 122.

II.

The Mistake was a Mistake of Law.

1. It is not pretended that there was an omission of any word or phrase which the parties supposed to be in the contract.

2. Each read it, and each thought it gave exclusive rights, and each was satisfied. Each assented to it with his eyes open.

Transc., folio 230;

Transc., folio 121.

III.

THE MISTAKE WAS NOT A MISTAKE OF THE SCRIVENER.

1. The answer denies positively that there was any verbal agreement (Transc., folio 36–37). This cannot be overcome without something more than the testimony of a single witness. The only witness produced to overcome it is Laver himself, whose testimony, as we have seen, does not make out his case, while Ingle's testimony is clear in support of his answer.

1 Dan. Ch. Pr., 843 [4th edition].

2. The solicitors were employed *not* to write out the agreement of the parties, but to make an experimental instrument to be submitted to Laver for his consideration; and no contract was made till the parties signed it.

3. There is no ground for supposing that the solicitors made any mistake. Ingle was in a hurry to leave New York, and probably told Messrs. Van Santvoord & Hauff to make a license, with such and such covenants in it. It is not to be supposed for a moment that a patent lawyer of unimpeached standing, if instructed to draw up an *exclusive* license would have made such an instrument as this.

4. A scrivener's mistake is only available when the contract has been fully made by the parties, and nothing remains for the scrivener to do but to put it in writing; or to draw an instrument in execution of a former contract.

This draft was read over and examined by Laver, who made two changes, not affecting the "exclusive rights" question—thought he understood it, etc.,—and then sent it back to New York with a letter, October 28.

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Counsel for appellant relies upon the following cases:

Hunt v. *Rousmaniere*, 1 Pet., 13; and
Hartford v. *Sal. Ore Co.*, 41 Conn., 133.

But in these cases, there were written contracts providing for future instruments, and in drawing the latter, the mistakes were made. So in

Brioso v. *Pac. M. Ins. Co*, 4 Daly, 246.

A memorandum was to be indorsed on a policy, in pursuance of a bill of lading, and in making the indorsement, the mistake occurred.

In all three of these cases, the relief sought was *reformation* not *cancellation.*

In a case where a party was entitled to relief, by reason of a scrivener's mistake, cancellation was refused, but *reformation* granted.

Van Donge v. *Van Donge*, 23, Mich., 321.

Finally, the Bill does not aver that the mistake was made by the scrivener; there is no issue on that point, and no evidence in support of it.

IV.

Laver has no Equity to Entitle him to the Relief he Claims.

1. Up to 1873, the mistake had done Laver no harm; Dennett & Co. had always treated it as an exclusive license, and Laver knew they did so.

Transc., fol. 226, 154.

So long as Dennett & Co. licensed nobody else, Laver could work the invention under this agree-

ment, as well as under any other. But he appears to have disregarded his agreement to work it, and to have devoted himself chiefly to trying to sell local licenses. He neglected the "immense opportunity" afforded by the fires at Boston and Chicago.

Transc., fol. 130–156.

Two years after the agreement was made, Laver was conducting, through Fuller, his agent, a negotiation with one McKim to buy a license for New England. This negotiation failed, because McKim discovered that Laver's license did not give him exclusive rights. About February, 1873, Fuller informed Laver, by telegram, of this defect in the contract.

Transc., folio 164.

If time was important, Laver ought to have telegraphed at once to Dennett & Co., at London; but neither he nor Fuller did so. Laver, however, wrote a letter to Dennett & Co., which Dennett & Co. answered at once by telegram, offering to reform the agreement, and wrote to the same effect to Fuller and to their solicitors.

Ingle's deposition, Transc., fol. 223, *et seq*;
Laver's testimony, Transc., fol. 131;
Laver's letter, Transc., fol. 192;
Telegram, Transc., fol. 233.
Ingle's letter, Transc., fol. 255.
Ingle's letter, Transc., fol. 165.

An amended contract was drawn up by Dennett & Co.'s solicitors, who gave notice of it to Laver.

Laver's testimony, Transc., fol. 132.

Laver never availed himself of this, and never did anything towards having the contract reformed, though the defect in the original contract was the only obstacle to the sale to McKim.

Transc., fols. 100–101.

And although it was not till the fall of 1873 that McKim finally declined to buy.

There is no evidence that this sale miscarried by reason of the defect in the contract alone. Had the contract been rectified promptly, as it might have been, if Laver had attended to it, there is no reason to suppose that McKim would have given up the purchase. Laver testified thus:

"This [the discovery of the defect] led to correspondence with Dennett & Co., and delay till the fall of 1873, when the parties negotiating for the purchase, Messrs. McKim, declined to buy. They, in the meantime, not being able to wait, had secured or decided on another patent."

Transc., fol. 88.

Whose fault was it that McKim was kept waiting? Dennett & Co. had consented on the 6th of May to amend the contract, and they would have consented in February, had Laver informed them of his difficulty.

Laver never even surrendered his license, as he might have done under the contract. He has neither worked the invention himself, nor suffered Dennett & Co. to get any benefit from their patent. Dennett & Co., on the contrary, have manifested every desire to do what was right.

See Transc., fol. 162.

V.

There was no Failure of Consideration.

Counsel for appellant insists that the consideration for Laver's contract had failed, and therefore it should be cancelled. But that argument seems to have no force, and for these reasons:

1. There never was any agreement on Dennett & Co.'s part to convey exclusive rights. The only agreement ever made was that contained in the written contract. If this contract had never been signed, Laver would have had no rights at all under Dennett's patent.

2. Had there been a distinct and separate agreement to assign the patent to Laver, in consideration of which he had entered into the covenants contained in this contract, then, on failure of Dennett & Co. to assign, Laver could have pleaded the total failure of consideration.

3. Total failure of consideration is a defence at law, and for that very reason it cannot be made the foundation of this bill in equity, which is

based entirely on the *want* of any legal defence to the action on the contract.

4. The fact is that no exclusive right had been promised or given; but each party supposed it had been done by the very instrument in question, and each was mistaken in supposing so. See *McKee* v. *Hoover*, 1 Monr., 32.

The bill asks for relief on the ground of fraud and mistake, not on the ground of failure of consideration.

VI.

As a General Rule, Equity will not Cancel a Contract, when the Parties Cannot be Restored to their Original Position.

To cancel this contract now would be in effect the same as allowing Laver to rescind it, which, of course, he could not do. Dennett & Co. put their whole rights under their patent in the hands of Laver—at least that was the understanding of both parties, and such was the practical construction that Dennett & Co. always put upon the contract. Dennett & Co. have got no benefit from their patent; it has expired, and their only remedy is against Laver on his contract.

Laver cannot be heard to say that he has received no benefit from the patent. He got the license and held it; that is enough. He gave a license to McKim, which does not appear to have been revoked; for all we know, McKim may have paid royalties under it. (Transc., fol. 141–142.)

Laver took the risk of making the patent pay. As well might the lessee of an unprofitable farm refuse to pay his rent.

In case of rescission of a sale, it is not enough to restore everything which the vendee has received of value to him, but also everything which may be of value to the vendor.

Thayer v. *Turner*, 8 Metc., 552;
Conners v. *Henderson*, 15 Mass., 321.

Several years of the life of a patent are presumptively valuable to the patentees.

Counsel for appellant cites:

Elting M'f'g Co. v. *Martin*, 5 Daly, 417;
Webster v. *Enfield*, 10 Ill., 298.

But they were actions at law on contracts, where one party had failed to perform, and no benefits had been received by the other.

Even in a case of mistake of fact, this Court refused to cancel an instrument, when the parties could not be put in *statu quo*.

Grymes v. *Sanders*. 93 U. S., 55.

VII.

As a General Rule Equity will not Grant Relief Against a Mistake of Law.

Hunt v. *Rousmanier*, 1 Pet. 1;
Bank U. S. v. *Daniel*, 12 Pet. 55;
Roger v. *Ingham*, 3 Ch. D., 351.

There is no reason for an exception in this case, for—

(1.) Laven was negligent in signing the contract; he cannot shift the burden of his own carelessness on Dennett & Co. He read the contract—he said he was satisfied with it;—had he asked that the word "exclusive" be inserted it would have been done. If a contract be cancelled for such reasons as Laver gives, there would be no security in business. The Supreme Court so ruled in

Upton v. *Tribilcock*, 91 U. S. 45.

And see also to same effect:

Kearny v. *Sascer*, 37 Md., 276;
Nelson v. *Davis*, 40 Ind., 369;
Beaufort v. *Neald*, 12 Clark & F., 248;
Barker v. *Comins*, 110 Mass., 477;
Oiler v. *Guard*, 23 Ind., 219;
Voorhis v. *Murphy*, 26 N. J. Eq., 434;
Custard v. *Custard*, 25 Texas (suppl't) 49;
Arthur v. *Arthur*, 10 Barb., 15;
Dupre v. *Thompson*, 4 Barb., 282;
Lewis v. *Jones*, 4 B. & C., 506.

(2.) Laver had had the license over two years without finding any fault with it. When he learned of the omission in February, 1873, the contract would have been corrected at once, had he asked for it. McKim did not finally decline to buy the New England right, till the fall of 1873 (Laver's testimony, Transc., fol. 88), and the reason he refused was, in my opinion, not because of the defect in the contract, but because *he could not get Laver to rectify it.*

(3.) Laver failed to *work* the invention, as he agreed to do. The defect in the contract would in no wise have interfered with his doing this, for Dennett & Co. never licensed anybody else.

(4.) If Laver had any right to rescind the contract on discovering the defect, he was bound to do so at once. He did not "repudiate" the contract till some nine months afterwards.

Transc., fol. 179;
Addison Contracts, § 642;
Thomas v. *Bartow*, 48 N. Y., 200;
Barfield v. *Price*, 40 Cal., 542.

The only equity Laver has is for a reformation of the contract, and that Dennett & Co. were always willing to give him. But his bill does not ask for that; and even were the contract reformed, his liability for the minimum royalty would be the same as it is now, and the action at law could not be enjoined.

Counsel for complainant, arguing that equity would cancel a contract in a case of pure mistake of law, cites:

Hunt v. *Rousmaniere*, 8 Wheat., 174; and
Wheeler v. *Smith*, 9 How., 55;
Hearst v. *Pujol*, 44 Cal., 235;
Wheelon's Appeal, 70 Pa., 410.

But in *Hunt* v. *Rousmaniere*, the Court only declines to commit itself on the point (see opinion, p. 216). *Wheeler* v. *Smith* was a different kind of case. An *executed* release was set aside, not particularly

on the ground of mistake of law, but because it was an unfair transaction between a *cestui que* trust and his trustee. In *Hearst* v. *Pujol*, the mistake was not as to the *meaning* of the instrument. In Wheelon's appeal there was a trust relation, fraud and mistake of fact.

A bill alleged a prior verbal contract, that the defendant put it in writing and in doing so, fraudulently omitted something; but that the writing was submitted to complainant, who read it, and signed it; but being unlearned in the law, mistook its legal effect. Held: that the bill made no case even for reformation.

Hoover v. *Reilley*, 2 Abb., U. S., 471.

I know of no case when an *executory* written contract, made by both parties with their eyes open, and without fraud or mistake of fact, has been cancelled by a Court of equity, when the parties could not be put in *statu quo*.

R. E. HOUGHTON,
Counsel for Appellees.

San Francisco, Sept. 26, 1883.

109-99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~95~~ 20

WENDELL R. KING, APPELLANT,

vs.

AUGUST GALLUN AND ALBERT TROSTEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 17, 1879.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the sixth day) of January, A. D. 1879, present and presiding the honorable Thomas Drummond, circuit judge.

Among other, the following proceedings were had, to wit:

WENDELL R. KING, COMPLAINANT,
vs.
AUGUST GALLUN & ALBERT TROSTEL, DEFENDANTS. } In equity.

Be it remembered that heretofore, to wit, on the thirteenth day of April, A. D. 1876, came the above-named complainant, Wendell R. King, by his solicitors, Messrs. Jenkins, Elliott & Winkler, and filed his bill of complaint against the above-named defendants, as follows:

2 *Bill of complaint.*

United States circuit court, eastern district of Wisconsin, ss.

WENDELL R. KING
vs.
AUGUST GALLUN AND ALBERT TROSTEL. } In chancery.

To the honorable the judges of the circuit court of the United States for the eastern district of Wisconsin, in chancery sitting:

Wendell R. King, of Chicago, in the county of Cook, and State of Illinois, a citizen of the United States, brings this his bill of complaint against August Gallun and Albert Trostel, doing business at Milwaukee, in the State of Wisconsin, and in the eastern district of said State, under the firm name of "Trostel & Gallun."

And thereupon your orator complains and says that before the thirtieth day of June, one thousand eight hundred and seventy-four, your orator was the true, original, and first inventor of a certain, new, and useful improvement in baled plastering hair, not known or used by others before his said invention thereof, and which had not, at
3 the time of his application for a patent therefor, been in public use or on sale with his knowledge or consent for more than two years.

And your orator further shows unto your honors that your orator, so being the inventor of said improvements, and being a citizen of the United States aforesaid, made application to the proper department of the Government of the United States for letters patent therefor, in accordance with the then existing acts of Congress in such cases made and provided; and he having duly complied in all respects with the conditions and requirements of said laws, such proceedings were had that on the thirtieth day of June, one thousand eight hundred and seventy-four, letters patent of the United States for the said improvements

were issued in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and delivered to your orator, whereby there was granted and secured to your orator and his heirs, executors, administrators, and assigns, for the term of seventeen years from the day of the date thereof, the full and exclusive right of making, using, and vending to others to be used, the said improvement and invention, a description whereof is given, in the words of the said inventor, in a schedule in writing, accompanied by drawings, duly annexed
4 to said original letters patent, when the same were issued and made a part thereof, as by the said original letters patent, or a duly authenticated copy thereof, in court to be produced, will more fully appear; a copy of which without the drawings is hereunto annexed, forming a part of this bill, and marked Exhibit A.

And your orator further shows unto your honors that the said improvement and invention, patented as aforesaid, has hitherto been in the exclusive possession of your orator, and has hitherto been and still is of great value to your orator; that your orator has brought the same into use greatly to the advantage of the public, and, but for the infringement hereinafter complained of, your orator would now be in the undisturbed possession and enjoyment of the exclusive privileges secured to him by the said original letters patent granted as aforesaid to your orator.

Yet the said defendants, as your orator is informed and believes, well knowing the premises, but contriving and confederating with others to injure your orator, and without his consent or allowance, and without right, and in violation of your orator's said right, have, within the said State of Wisconsin, and within the said eastern district of said State, made and used and vended to others to be used bales of
5 plastering hair containing said invention, but how many your orator cannot state, but prays that defendants may discover and set forth the number containing the improvements as a material part thereof, as set forth and patented in the original letters patent issued as aforesaid to your orator, and thereby the said defendants have infringed, and still do infringe, and your orator fears that they will continue to infringe upon the exclusive right and privilege of your orator, secured to him as aforesaid.

To the end therefore, that the said defendants may, if they can, show why your orator should not have the relief herein prayed, and may—but not upon oath, an answer upon oath being hereby waived— and according to the utmost of their knowledge, remembrance, and belief, full, true, direct, and perfect answer make to all and singular the premises, and that they may be decreed to account for and pay over to your orator all gains and profits realized by them from unlawful making, using, and vending to others to be used the improvements invested to your orator as aforesaid, and may be perpetually restrained by an injunction to be issued out of this honorable court, from making, using, or vending to others to be used, any bales of plastering hair containing the
6 improvements and inventions or any part thereof, secured as aforesaid to your orator, and that your orator may have such other or further relief as equity may require and to your honors may seem meet.

And your orator further complaining says, that he has expended a large amount of money in perfecting said improvements and inventions, and has invested a large amount of money in machinery and leases for the manufacture of said improvements and inventions, and has also ex-

pended a large amount of money in advertising and introducing said improvements and inventions, whereby together with pains taken to manufacture said improvements and inventions in a substantial workmanlike manner, a large demand for said improvements has been created; and that said improved baled plastering hair has been advertised by your orator as "baled plastering hair," and has become to be known by the name of baled plastering hair to the trade and public; that the defendants well knowing these facts are making and vending the aforesaid improvements, and representing them to be the improved baled plastering hair, but at the same are making them in a cheap and inferior and unworkmanlike manner; and that your orator has reason to believe and does believe that if the defendants are allowed to con-
7 tinue to make and sell said improved bale plastering hair for any length of time, they will do great damage to your orator, and such a damage as cannot be estimated at the termination of this suit; therefore your orator further prays that these defendants may be restrained or enjoined by a preliminary or temporary injunction or order to be issued out of this honorable court from making, using, or vending any baled plastering hair containing the improvements and inventions secured as aforesaid to your orator by said aforesaid letters patent during the pending of this suit.

May it please your honors to grant unto your orator not only a writ of injunction conformably to the prayer of this bill, but also a writ of subpœna directed to the defendants, and commanding them at a certain time and under a certain penalty to appear before your honors in this court, then and there to answer to this bill of complaint, and to abide by and perform such a decree as this court shall make in the premises. And your orator will ever pray, &c., &c.

WENDELL R. KING.

JENKINS, ELLIOTT & WINKLER,
Complainant's Solicitors.
COBURN & THACHER,
Of Counsel.

8 UNITED STATES OF AMERICA,
Northern District of Illinois:

Wendell R. King, the complainant in the foregoing bill of complaint, personally appeared before me on this 3rd day of April, A. D. 1876, and makes oath that he has read the above bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be upon information and belief, and as to those things he believes them to be true.

WENDELL R. KING.

Subscribed and sworn before me this 3rd day of April, A. D. 1876.
[SEAL.] JOHN B. EAMAN,
Notary Public.

Subscribed and sworn to before me this 12th day of April, A. D. 1876.

EDWARD D. HOSMER,
United States Commissioner in and for the Northern District of Illinois.

9 EXHIBIT A.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Wendell R. King, of Chicago, in the county of Cook, and in the State of Illinois, have invented a new and useful improvement in baled plastering hair, of which the following is a specification:

It is found that the wants of the trade in plastering hair require it to be compressed for transportation in packages of from three to five bushels; this amount of hair forms a package of a good size to conveniently handle, weighing from twenty to forty pounds. The trade unit for the article of plastering hair is always the bushel; it is sold by the bushel or by the multiple thereof.

Heretofore this hair has been packed in a mass of a certain number of bushels baled together, varying in amount as the order required, so that when received the retail dealer was compelled to parcel out the same and weigh it to suit his customers. This is a disagreeable and difficult thing to do, as the hair is dirty and matted together, and after it is once removed from the case into which it has been compressed by a baling press, is bulky and not easy to reduce again to a con-
10 venient package. For this convenience of the trade I purpose to form the hair in small bundles of one bushel each, and unite several bundles into a bale of a convenient size for transportation.

I first place a bushel of hair into a paper sack loosely, or only so far packed as may be readily done by hand; several of these one bushel packages are then placed side by side in a baling press. I use for this purpose the baling press heretofore patented to me; they are thus compressed forcibly together, so that the bale produced will be a compact, firm bale, occupying only about one-fifth of the original bulk; the paper bags which still envelope the individual bushels of the bale keep said bushels separate, and serve at the same time to protect the hair.

The bale, after being compressed, is tied in the usual way, and is then in shape for transportation without further covering, although it may be desirable if the bale is to be sent a long distance to envelope it in a stout sacking cover. Hair baled thus may be separated by the retail dealer into bushel packages, each of which remains compressed into a small size, and is in convenient condition to handle.

In the accompanying drawings, which form a part of this specification—

Figure 1 is a perspective view of one of the bundles containing a bushel before being baled and compressed.

11 Figure 2 is a view of a bale formed of several of said bundles, compressed and secured, ready for transportation.

Figure 3 is a view of one of the bushel bundles as it appears after being removed from the bale.

In the said drawings A represents the bushel bundles incased in paper bags or equivalent material; B is the bale formed of several of said bushel bundles, compressed side by side in a press, and secured in some proper way, as by the cords C.

In baling the hair it may be weighed when it is placed in the paper bags, to ascertain when the bushel is complete.

The weight of a bushel of hair varies according to the laws and cus-

toms of various localities, but always is reducible to pounds, being measured by weight and not by quantity.

Having thus described my invention, I claim as an article of manufacture the bale B of plasterers' hair, consisting of several bundles A, containing a bushel each by weight, enclosed or incased in paper bags or similar material, and united, compressed, and secured to form a package, substantially as specified.

(Signed) WENDELL R. KING.

Witnesses:
HEINRICH F. BRUNS,
JOHN W. MUNDAY.

12 *Rule for injunction.*

And same day (April 13, 1876), entered in the order and rule book an order that the defendants show cause by Friday, the twenty-first day of April instant, at two o'clock in the afternoon, why an injunction should not be issued according to the prayer of the bill on file.

Whereupon a subpœna issued, returnable the first Monday of June next, as follows:

Subpœna.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin:

[SEAL.] The President of the United States of America to August Gallun and Albert Trostel, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the eastern district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of June next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by Wendell R. King. And to do further, and to receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

13 This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said August Gallun and Albert Trostel, if to be found in his district, and due return thereof make.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundredth.

EDWARD KURTZ,
Clerk.

JENKINS, ELLIOTT & WINKLER,
Solicitors.

It is ordered by our said court that the said August Gallun and Albert Trostel, the defendants aforesaid, do enter their appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause

by Friday, the twenty-first day of April, instant, at two o'clock in the afternoon, why an injunction should not be issued according to the prayer of the bill on file.

Return.

Subpœna returned: Served on the within named August Gallun, by delivering to him personally a copy of this subpœna, this 13th
14 day of April, 1876; and served on the within named Albert Trostel, by leaving a copy of this subpœna at his usual place of abode with a member of his family of suitable age and discretion, whom I informed of the contents, he not being found this 13th day of April, 1876.

Fees, $4.92.

C. S. HAMILTON,
Marshal,
By W. S. HAMILTON,
Deputy.

MAY 17, 1876.

This day came the defendants, by their solicitor, Mr. Joshua Stark, and filed their answer, as follows:

Answer.

United States circuit court, eastern district of Wisconsin. In equity.

WENDELL R. KING
vs.
AUGUST GALLUN & ALBERT TROSTEL.

The joint and several answer of August Gallun and Albert Trostel, defendants to the bill of complaint of Wendell R. King, complainant.

These defendants now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof
15 as these defendants are advised is material for them to make answer unto, they answer and say, that they admit the issue of letters patent to the complainant as alleged in said bill, but they allege, claim, and insist that the said pretended invention and improvement intended to be covered and secured by said letters patent, and described in the schedule and drawings thereto annexed, is neither a new and useful art, nor a machine, manufacture, or composition of matter, nor a new and useful improvement thereof within the meaning of the patent laws of the United States, and the same was and is not the subject of letters patent under the laws of the United States, and said letters patent are therefore void and ineffectual to secure to the said complainant any exclusive right or privilege, as claimed in and by his said bill.

These defendants further answering, say it is not true as alleged in said bill that the complainant is the first and original inventor of the mode of putting up articles in compressed bales after the manner described in the specifications and claim of the complainant annexed to his said pretended letters patent; that said mode of baling was not new or unknown at or before the issue of said pretended letters patent,

but on the contrary thereof it had been in common use among
16 manufacturers and merchants in the United States and Europe for more than ten years before that date, and during all that time had been and still is employed by manufacturers and dealers in the packing and baling of yarns, worsteds, battings, tobaccos, and many other articles of merchandise, for greater convenience of transpor'tion, and subsequent separation into parcels of uniform quantity or weight.

These defendants have not any knowledge or information sufficient to form a belief as to whether or not the said complainant was the first to apply said method of baling to plastering hair, but they claim and insist that if the statement of the bill in that behalf is true, it did and does not entitle him to the letters patent described in said bill, because these defendants say that packages of merchandise and articles of trade of small size or weight, put up in packages or parcels convenient and adapted to the wants of the retail trade, have for more than ten years last past been commonly and usually packed together in compressed bales or cases by manufacturers and wholesale dealers throughout this country for more convenient handling and transportation, and such mode of packing and baling articles and goods has during all that
17 time been applied so generally and to such a great variety of trade articles and wares, that the same is and has been during all that time well known to manufacturers, merchants, and men of business generally in this district and throughout the United States.

These defendants admit that they have baled and sold plastering hair in bushel bags compressed together, substantially as is alleged in the bill, but they deny that in so doing they have injured the complainant or violated any legal right of the complainant, and they deny that in so doing they have infringed upon any legal or valid or exclusive privilege or right of the said complainant.

The number of bales of such plastering hair sold by these defendants they are not now able to give with accuracy, but they believe it does not exceed two hundred.

These defendants further answering deny that they have ever represented their said baled plastering hair as the baled plastering hair of the complainant; on the contrary thereof, all the bales so made and sold by these defendants have borne in clear and distinct letters the imprint of the firm of these defendants upon the sacks composing such bales. And they deny that the term "baled plastering hair" has come to be understood or known to the trade or public as describing the hair put up by the
18 complainant; and whether or not the complainant has expended a large amount or any amount of money in perfecting his said pretended improvements and inventions, or has invested a large or any amount of money in machinery or cases for the manufacture of said pretended improvements and inventions, these defendants have not information or knowledge sufficient to form a belief, but from the nature of such pretended improvements and inventions they deem it very unlikely that any moneys have been so expended, unless for the procuring of the issue of said pretended letters patent.

And these defendants submit to this honorable court that all and every of the matters and things in the said complainant's bill mentioned and complained of, are matters which may and ought to be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and these defendants hope they will have the same benefit of their defense as if they had demurred to the said complainant's bill.

And these defendants deny all unlawful combination and confederacy

in the said bill charged; without this, that any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed, or avoided, traversed, or denied, is true to the knowledge or belief of these defendants.

19 All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

A. GALLUN,
A. TROSTEL,
By A. GALLUN.

JOSHUA STARK,
Solicitor & of Counsel for Defendants.

EASTERN DISTRICT OF WISCONSIN, *ss:*

On this seventeenth day of May, A. D. 1876, August Gallun, one of the defendants in the foregoing answer, appeared personally before me, and being by me first duly sworn on oath, did depose and say that he has heard said answer read and knows its contents, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and to those matters he believes it to be true.

EDWARD KURTZ, *Clerk.*

JULY 28, 1876.

This day came the complainant, by his solicitors, and filed his replication, as follows:

Replication.

United States circuit court for the eastern district of Wisconsin. In equity.

20 WENDELL R. KING
vs.
ALBERT TROSTEL & AUGUST GALLUN.

The replication of Wendell R. King, complainant, to the answer of Albert Trostel and August Gallun, defendants.

This repliant saving unto himself all manner of exceptions to the many insufficiencies of said answer, for replication thereto saith that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto; and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without that, that any other matter or thing whatsoever in said answer contained, not herein replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall award, and humbly prays as in and by his said bill he hath already prayed.

JENKINS, ELLIOTT & WINKLER,
Compl't's Solicitors.

21 *Docket entries.*

OCTOBER 12, 1876.

This day came the parties by their counsel, and by consent it is ordered

by the court that A. L. Bunting, of Chicago, Illinois, be and hereby is appointed special examiner in this cause, to take the testimony of witnesses residing at or near the said city of Chicago.

JANUARY 22, 1877.

This day came the parties by their counsel, and by consent it is ordered by the court that the time to take testimony on behalf of the defendants be extended to the first day of March next.

FEBRUARY 24, 1877.

Depositions on behalf of complainant received per express and filed.

MARCH 2, 1877.

This day came the defendants by their counsel, and on their motion and affidavit filed it is ordered by the court that the time for the defendants to take testimony herein be extended to the first day of April next.

JULY 16, 1877.

Depositions on behalf of defendants received from J. Stark, esq., and filed.

SEPTEMBER 14, 1878.

On motion of Joshua Stark, defendants' solicitor, ordered that this cause be set down for hearing at the October term of this court, to be held on the first Monday in October, 1878.

22 DECEMBER 17, 1878.

On motion of Joshua Stark, def't's sol'r, ordered, that this cause be set down for hearing on pleadings and proofs at the next term of this court, commencing on the first Monday of January next.

APRIL 16, 1879.

This day came the parties by their counsel and this cause came on to be heard upon the pleadings and proofs and was argued by Messrs. Coburn & Winkler for the complainant, and by Mr. Joshua Stark for the defendants, and the hearing being concluded, the court took the same under consideration.

And the following testimony was read in evidence on the hearing of said cause:

COMPLAINANT'S TESTIMONY.

United States circuit court, eastern district of Wisconsin, ss.

WENDELL R. KING
vs.
ALBERT TROSTEL ET AL. } In equity.

At Chicago, Illinois, on this 20th day of October, A. D. 1876, before me, L. A. Bunting, notary public and special examiner, under rule 67, in said cause, pursuant to the notice hereto annexed, testimony was taken on behalf of the complainant, at the office of Coburn & Thacher,

23 rooms 52, 53, and 54, Ashland Block, N. E. corner of Clark and Randolph streets, commencing at 11 o'clock a. m.

Present, Lewis L. Coburn, esq., of counsel for complainant, and A. McCoy, esq., of counsel for defendants.

Deposition of J. J. Montague.

J. J. MONTAGUE, the first witness in behalf of the complainant, being duly sworn, deposes and says in answer to interrogatories to him propounded by L. L. COBURN, as follows, to wit:

Q. 1. What is your name, age, residence, and occupation?

Counsel for complainant here offers in evidence letters patent No. 152560, issued to Wendell R. King, June 30th, 1874, for plastering hair bale, and the same is marked Compl't's Exhibit A, L. A. Bunting, special examiner. Also a bale of plastering hair as made by Mr. King, under and in accordance with said letters patent.

(Defendant here objects by his counsel to the Exhibit A, because it is no proof of letters patent, not being a certified copy. Also objects to the exhibit of baled hair, because there is no proof of it being made by Mr. King under any letters patent.) And the same is marked Complainant's Exhibit B, L. A. Bunting, special examiner.

Also a bale of plastering hair made and sold by the defendants, and the same is marked Complainant's Exhibit C, L. A. Bunting, special examiner.

(Defendants' counsel objects to Exhibit C, as there is no proof it was made by defendants.)

24 A. J. J. Montague; age, 41; 264 W. Washington st., Chicago, Ill.; I am settling up my business now.

Q. 2. What has been your business, and how long have you been engaged in such business—in the business that you are now engaged in settling up?

A. Dealing in lime, cement, and hair; about 8 years.

Q. 3. Are you acquainted with the parties to this suit, Wendell R. King and Trostel & Gallun, or either of them? and if yea, state how long you have known them, or either of them.

A. I am acquainted with Mr. Wendell R. King; have known Mr. King about 8 years.

Q. 4. Have you had dealings with him in connection with your business during that time? and, if yea, state to what extent, and what has been Mr. King's business, if you know.

A. I have had business with him during the whole of that time; about to the extent of ten thousand dollars, if my memory serves me right, between eight and ten, certain. Mr. King was dealing in plastering hair, was and is now, I think.

Q. 5. In what way, if you know, does he conduct his business; that is, of whom does he mostly purchase, and what does he do to the hair, and to whom does he mostly sell?

A. He purchases the most of his hair from tanneries, some from
25 commission merchants. That that he purchases from the tanneries he gets in a wet state from the hide and that is taken to his establishment and is dried, and the most of it baled, sold to lime dealers throughout the whole country, and men dealing in lumber and cement.

Q. 6. What kind of bales does he mostly put up his plastering hair in—that is, how are they made?

A. He puts up about one-half in five-bushel bales, and they are cov-

ered with coarse bagging; the other half in paper bags. I mean of what he bales when I say one-half. The plastering hair is put up one bushel in a package, and five of those put together makes what we call a "bale."

Q. 7. Are there any of those bales before you, or any bales here like them? and, if yea, please point them out.

A. There is two bales here like them—fac-similes to them, with Mr. King's trade-mark on one of them, Exhibit B. The other is like his, but I could not recognize it by anything that is on it. It is Exhibit C, has marked on it "Trostel & Gallun, Milwaukee, Wisconsin, one bushel of plastering hair."

Q. 8. Is Mr. King carrying on the business of the manufacture of plastering hair bales like the bales Compl't's Exhibits B and C, extensively and at different places?

(Objected to by counsel for defendant, because leading.)

A. Mr. King is carrying on the business putting plastering
26 hair in that kind of bales extensively, and in nearly every large city in the Northern States.

Q. 9. Do you consider plastering hair bales like Exhibits B and C to be any better, or any saving in any way over any other kind of plastering hair packages that you have ever seen or handled upon the market? and, if yea, state in what respects, giving your reasons for any opinion you may express.

A. I consider them better on the account of the economy in handling, also the convenience. I usually had to pay from eight to fifteen cents per bushel more for it. For instance, when country orders came in, we could not send them anything else except baled hair. Their letters expressed so many bales of one bushel packages, and some of our city contractors would pay more for it on account of its economy.

Q. 10. Why, in your opinion, do they prefer them?

A. In the country their orders from their consumers are small usually, farmers would buy a bushel or two bushels of hair, as they should want it, and all the dealer had to do would be to pass them a bushel bag or package. If the dealer bought his hair by the barrel or large sack, as it is sometimes handled in the market, there would be a waste of weighing it out, hair being filled with lime more or less, it would be dirty work weighing or handling it, and the contractors in the city prefer it for the same reasons, as any they may have left it is easy taken
27 care of. The contractors also think they get better hair in the packages than any other way, is one of their reasons for preferring it.

Q. 11. Is there any advantage in having the bale compressed over having it loose in barrels or sacks? and, if there is, state what those advantages are.

A. There is an advantage. The hair is light, and when compressed it takes not one-quarter of the room; easily handled also. There is more than a quarter difference in weight, I think.

Q. 12. Have you, as a dealer, always understood from the time plastering hair bales like Exhibits B and C were first put upon the market, that Wendell R. King had a patent on that kind of bale, and have the trade, so far as you know, respected the patent, and bought all of the bales of that kind which they have handled of Mr. King?

(Objected to by defendants' counsel as incompetent.)

A. I have always been given to understand that Mr. King had a patent on them; he told me so himself. The dealers in Chicago all bought their hair, the bales, from Mr. King.

Cross-examination by Mr. McCoy, defendants' counsel:

X Q. 1. You say in your examination-in-chief that Mr. King purchased a large amount of his hair from the tanneries, do you know that of your own knowledge? and, if so, state how you acquired that knowledge.

28 A. I knew it from my own knowledge; I went to some of the tanneries myself to make arrangements with them, and found Mr. King had a contract with them by the year for all the hair that they took from the hides.

X Q. 2. How many of those tanners did you go to? and name them.

A. I don't remember the number exactly, and never knew their names, except one of them. I drove to different tanneries with my horse and buggy, to make inquiries, and got my information directly from the tanners, without enquiring their names. The Hide & Leather Company Tannery was the one name I knew.

X Q. 3. You say that the Exhibits B and C are alike; why do you say they are alike?

A. They are put up in one bushel packages, the same as Mr. King puts his up, and I have never seen any other put up in this way, except from his establishment.

X Q. 4. Have you looked inside of these bales?

A. In handling one, Exhibit B, saw the corner was torn and hair protruding, and I supposed the other had hair in also.

X Q. 5. Then you don't know what the contents of Exhibit C are?

A. It is marked "plastering hair," and to the best of my knowledge and belief it is.

29 X Q. 6. You say Mr. King carries on this business of putting up hair extensively in nearly all the large cities of the North in this country; how do you know that fact?

A. I know it by trying to purchase hair. I consider that Mr. King had a monopoly in this city, and I tried to purchase from other cities, and was referred to Mr. King, of Chicago, in all cases—Buffalo, N. Y.; Milwaukee, Wis.; Detroit, Mich.; Louisville, Ky.; Cincinnati, and St. Louis. I even corresponded to the city of New York.

X Q. 7. How was he carrying on this extensive manufacturing in these cities; entirely with his own means, or did others pay him a royalty for manufacturing in his name?

A. That I don't know, whether he used his own means or not.

X Q. 8. You don't know, of your own knowledge, whether Mr. King had a dollar invested in his manufacturing business in these cities?

A. I don't know whose money was invested in these cities in the business.

X Q. 9. Then you can't swear, of your own knowledge, that Mr. King is extensively manufacturing this hair in any of these large cities you have named?

A. Yes; I think I can. I was in his establishment at Milwaukee, Wis. They said it belonged to Mr. King, but I did not ask

30 whose money he was using. The same in Buffalo, N. Y. My letters from the other cities stated that Mr. King manufactured the baled hair in those cities.

X Q. 10. Then, you can only state, of your own knowledge, that he manufactured in those two cities—Milwaukee and Buffalo?

A. Also Chicago. I have been in his establishment here several times.

X Q. 11. What's the market value of one of his bushel packages, first at wholesale and second at retail?

A. I am not positive, but I think it was 32½ to 35 cents to the trade; large dealers got it a little less than the small dealers; at retail, for 40 cents.

X Q. 12. Is Exhibit C as valuable as Exhibit B, in your opinion?

A. I could not tell unless I opened the packages. By the outside appearance, it would have the same value.

X Q. 13. What would a bushel package of hair, put up in some other form different from Mr. King's plan, be worth at wholesale or retail on the market?

A. I never have seen anything as small as a bushel package on the market, except Mr. King's, but have bought in barrels and gunny sacks from eighteen to twenty-five cents per bushel, and sold it to consumers from thirty-five to thirty-seven and a half cents retail.

X Q. 14. Do you recollect what you stated in your answer
31 to direct interrogatory 9, that you paid more for Mr. King's bushel of hair than the ordinary bushel? If so, state what you said the difference was.

A. I think it was from eight to fifteen cents. I have bought hair in barrels shipped in from the country for 12½ per bushel, and there is more or less upon the market.

X Q. 15. I am not asking for exceptions upon the market, but for the ruling market prices.

A. My answer was for what I had paid and sold.

X Q. 16. Do what you pay and sell constitute the market price?

A. Dealers all buy as cheap as they can, but usually have one price to sell on.

X Q. 17. You don't pretend to say that the majority of the contractors of this city prefer Mr. King's packages?

A. I do pretend to say that the majority of the contractors use Mr. King's packages; and they can get hair in barrels or sacks when they wish it.

X Q. 18. What part of Milwaukee is Mr. King's establishment located in?

A. I do not remember. I stopped in at his establishment when I was on my way from Berthelet & Son's cement pipe factory. It may not be in the same location now. I don't know.

X Q. 19. How do you know that contractors think they get better hair from Mr. King's packages than elsewhere?

32 A. They told me so; I sold a great deal more of the packages than any other kind.

J. J. MONTAGUE.

Deposition of P. H. Archer.

P. H. ARCHER, the next witness, being duly sworn, deposes and says, in answer to questions propounded by L. L. COBURN, as follows:

Q. 1. What is your name, age, residence, and occupation?

A. P. H. Archer; age, 32; 563 Reed st., Milwaukee, Wis.; superintendent for W. R. King.

Q. 2. Do you know the parties to this suit, W. R. King and Trostel & Gallun, or either of them? and, if you do, state how long you have known them or either of them.

A. I have known them five years, all of them.

Q. 3. What is the business of W. R. King?

A. Dealer in plastering hair.

Q. 4. What does he do with the hair?

A. He buys it from the tanneries as they take it from the hide, dry it, and pack it in bales, the largest portion of it, and sells it all through the country.

Q. 5. Please look at Exhibits B and C, the bales now before you, and state if you know who made them, and tell all you know about them.

A. Exhibit C, to the best of my knowledge, has been made by Trostel & Gallun, Milwaukee, Wis., or at least my man has purchased it from them. The other is the same as we make.

33 Q. 6. What is the business of Trostel & Gallun, the defendants in this case?

A. Tanners, dealers in leather and plastering hair.

Q. 7. Were you ever at their establishment in Milwaukee?

A. I was.

Q. 8. Do they bale plastering hair; and, if they do, what kind of bales do they make?

A. They bale plastering hair in one bushel paper packages, and put five in a package; also packages of five bushels each.

Q. 9. Does one kind of bale that they make differ in any respect from the bale Complainant's Exhibit C, and, if it does, state in what respect.

A. One kind of bale the hair is all in one package, not in one bushel sacks, covered with canvas; the other kind is just like that Exhibit C.

Q. 10. How long have these defendants, Trostel & Gallun, been making bales just like the bale Complainant's Exhibit C.

A. To my knowledge, about two years.

Q. 11. When did you have this bale, Exhibit C, purchased?

A. April 29th, 1875.

Q. 12. How do you fix the date?

A. I take it from the date of their bill for that bale and two others purchased at the same time.

Q. 13. Will you describe just how Mr. King has the bales like Exhibit B made; that is, just the process gone through with by the men in making the bales?

34 Q. The hair is first dried, then put in paper sacks, eight pounds each; five of those are put in a press with two cords around and pressed into a bale; the cords are tied up so as to keep it in that shape.

Q. 14. Please examine the two bales, Exhibits B and C, now before you, and state whether they are alike or unlike, and, if they are unlike in any respect, state in what respect.

A. They are just alike except the different brands on the sack.

Q. 15. Did these defendants manufacture bales like Complainant's Exhibit C before Mr. King commenced making bales like Exhibit B; and, if they did not, how long was it after Mr. King commenced making bales of that kind before the defendants commenced making like Exhibit C? And had Mr. King built up a trade in and created a demand for bales like Exhibit B before Trostel & Gallun commenced making them?

A. They did not to my knowledge make any before Mr. King, or for a few years after, as he had a large trade for his paper bales before we knew or heard of Trostel & Gallun making any.

Cross-examination by Mr. McCoy, defendants' counsel.

X Q. 1. You didn't purchase Exhibit C from Trostel & Gallun, did you?

A. I did not, but authorized my man to do so.

35 X Q. 2. You don't know then, of your own knowledge, whether Exhibit C was purchased from Trostel & Gallun or not?

A. Not of my own knowledge, but cannot misdoubt my man, as I gave him the money to purchase them and he fetched them to me with their bill.

X Q. 3. All you know about Exhibit C being purchased from Trostel & Gallun is from what your man told you?

A. That and bringing their bales with their brand on them and their bill of purchase. I have seen the same kind of bales in their warehouse and on their wagon, and seen them delivered at the freight house marked for other firms.

X Q. 4. Were you ever at the place where Trostel & Gallun bale hair?

A. Yes, sir; I was.

X Q. 5. Did you ever see them bale hair like Exhibit C?

A. No, sir; they were not present when I was there.

X Q. 6. Did you ever see the apparatus or means by which Trostel & Gallun make their bales like Exhibit C?

A. I have seen the machine that I believe they were made in, as I have helped his man make one of the other kind of bales in the same machine which I supposed this one was made in, to the best of my belief.

X Q. 7. Did you ever see that machine of Trostel & Gallun's pressing bales like Exhibit C?

36 A. I never *see* them pressing bales like Exhibit C.

X Q. 8. Please describe that machine particularly and fully.

A. I could not do it very well without a pattern of it.

X Q. 9. Can't you tell what it is like?

A. I can describe it some, as we have one similar to it. It is a wooden frame with four or six legs; the center is what I should call a rack and pinion and two or three other cast wheels. At each side from this machinery is a box capable of containing about five of those one bushel packages, or that amount of hair not in packages; at both sides is a crank or handle to turn it with. By turning it this rack goes forward and presses those one bushel packages to one corner; underneath those packages are placed cord enough to go around the bale, which is tied when the bale is small enough.

X Q. 10. When are the cords tied, before pressing or after?

A. After pressing.

X Q. 11. If Trostel & Gallun should press in this machine a five bushel bale, being the other kind that you have described in your previous testimony, Mr. King in that case would not complain that they had infringed on his patent, is not that so?

A. That is not so, as he already complained when they begin making five-bushel packages.

37 X Q. 12. Do you mean to be understood that Mr. King complains in this suit of the defendants making a five-bushel package inclosed in one canvas or one covering?

A. I understand that he complained because they pack hair in one-bushel paper sacks like his. I don't know now whether he complains of the other or not, but he did heretofore.

X Q. 13. Is not this patent on which he sues in this suit solely for the supposed invention of putting up one-bushel packages into bales of five each?

A. I know nothing about his patents.

X Q. 14. How long have you been in the employ of Mr. King?

A. Directly and indirectly, about five years.

X Q. 15. You were in his employ, then, before this patent was obtained?

A. I don't know when any patent was obtained.

P. H. ARCHER.

Adjourned over until 11 o'clock Sat., Oct. 21st, 1876.

Met pursuant to adjournment at 11 o'clock a. m.

Deposition of Marcus C. Stearns.

MARCUS C. STEARNS, the next witness, being duly sworn, deposes and answers to questions proposed by L. L. COBURN as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Marcus C. Stearns; age, 60; Chicago, Illinois; manufacturer of quick-lime, and sell building material.

Q. 2. Are you acquainted with the parties to this suit, or either
38 of then; and, if so, how long have you known them or either of them?

A. I know no one but Mr. King. Have known him somewheres from 25 to 27 years.

Q. 3. Have you had business transactions with Mr. King? and, if so, please state the nature of it so far as it relates to plastering hair.

A. I have had transactions with him, and the principal business was buying of plastering hair.

Q. 4. Have you purchased baled plastering hair of him; and, if so, what kind of bales were they?

A. I have purchased two kinds of baled hair of him; one kind was burlaps, in five-bushel packages; the other kind is in bushel packages, five in a bale—bushel paper packages, five in a bale.

Q. 5. Which kind did you deal in first?

A. The burlaps; packages put up in burlaps, of five bushels.

Q. 6. Has the other kind of bales superseded the burlaps bales to any considerable extent?

Q. Yes, sir; it has taken the place of the burlaps to a considerable extent, particularly the country trade where they retail it.

Q. 7. Are there any objections or inconveniences or waste in handling and retailing the burlaps packages or bales that is obviated or saved in the use of the new bale, which consists of five-bushel packages like Exhibit B; and, if so, what are they?

39 A. Well, for country dealers, my opinion is that there is considerable saved in convenience and shortage over the five-bushel burlaps. Parties often come in and want one or two or three bushels of hair, here in the city at my place; it saves weighing out if they are in bushel packages.

Q. 8. Please look at the bale Exhibit B, and state if that is the kind of bales that you have purchased of Mr. King.

A. My opinion is it is, as near as may be.

Q. 9. Please look at the bale Exhibit C, and state whether that differs in any essential particular.

A. I see no difference in it, excepting that C has the heaviest paper, which makes a considerable difference to the seller in his favor.

Q. 10. Is there sufficient difference between the two bales, Exhibits B and C, so that if a person should come to you as a dealer, and bring you bales precisely like Exhibit C, with the exception of having Mr. King's brand on them in the place of Trostel & Gallun, that you would know that they were not Mr. King's packages, or would you believe

and take them for the same paper package bales that you had been in the habit of buying of Mr. King and selling to the trade?

A. If either package was brought to me without a brand I don't see difference enough in them to distinguish one from the other, that
40 I should take them both for Mr. King's hair.

Cross-examination by counsel for defendants:

X Q. 1. What do you mean by burlaps packages? Please explain.

A. They are packages put up in burlaps cloth, which is made from hemp or tow.

X Q. 2. Who invented the burlaps packages of plastering hair?

A. Mr. King was the first to my knowledge; that is five-bushel packages.

X Q. 3. Do you know whether Mr. King had a patent for the burlaps packages or bales?

A. Not of my own knowledge.

X Q. 4. Please state the difference between the burlaps packages of five bushels and the bale marked Exhibit B.

A. The burlaps packages are said to contain five bushels of hair; the paper package like B are said to contain five bushels of hair in one-bushel packages.

X Q. 5. Have you not seen bales of other articles, such as cotton and other goods, bales composed of several packages?

A. Yes; thirty-odd years ago I was a merchant in this town, used to sell cotton batting put up, or rolled up, in one-pound packages;
41 there would be from fifty to one hundred in a bale; they were rolled up and not pressed.

X Q. 6. Did you ever see Mr. King putting up these packages like Exhibit B?

A. I never did.

X Q. 7. Please state what the difference per pound on the market between the price of the burlaps packages and the packages or bale like Exhibit B.

A. At this time we sell them both at the same price.

X Q. 8. Please state the difference in the price of plastering hair in the barrel per bushel and the price per bushel of the same kind of hair contained in bales like Exhibit B, generally, on the market.

A. At this time the paper hair brings about from five to seven cents per bushel more than the barrel hair.

X Q. 9. Is the burlaps hair pressed?

A. The five-bushel packages are.

X Q. 10. State what packages of the burlaps hair are unpressed.

A. We get them in seven and eight bushel packages unpressed, and often we get them in wool sacks, which often contain two to three hundred pounds; the wool sacks are made of the same material as the burlaps packages.

42 X Q. 11. These packages you have described in your last answer are sent and put up by dealers generally, and not by Mr. King exclusively?

A. They are put up by manufacturers, tanners who make this hair, pulled off from hides.

X Q. 12. Please state the difference, if any, in the price of these unpressed burlaps packages per bushel and the price per bushel of bales like Exhibit B.

A. From 3 to 5 cents per bushel.

MARCUS C. STEARNS.

Adjourned over until 2 p. m., by consent of counsel.

Met pursuant to adjournment at 2 p. m., Oct. 21st.

Deposition of Harvey H. Talcott.

HARVEY H. TALLCOTT, the next witness, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. H. H. Tallcott; age, 40; residence, Desplaines; occupation, lawyer.

Q. 2. Do you know the parties to this suit, or either of them; and, if you do, how long have you known them, or either of them?

A. I do not know the defendants. I know the complainant, W. R. King; have known him for about six months last past.

Q. 3. Please look at the letters patent No. 152560, issued to W. R. King, this complainant, and marked Complainant's Exhibit A, and state whether you have examined said letters patent with a view
43 to testifying as an expert in this case; and, if you have, what do you find to be the article or mechanism therein shown and described, and more particularly specified in the claim thereof? State fully, and give your reasons for such opinions as you may express.

(Defendants' counsel objects to the question, first, because the paper shown witness is not the original patent nor certified copy thereof; second, because it is not shown that witness is an expert on the subject that he is called upon to testify; and, third, that the paper itself shows the invention or device, and is not ambiguous on its face.)

A. I have examined the Compl't's Exhibit A with the view of testifying as an expert in this case. I find it called an "improvement in baled plastering hair," and is composed of a bale of plastering hair, consisting of six packages, as is shown in the drawing, but neither the specifications nor the claim specifies or limits the number of packages that this bale shall consist of. Each package contains a bushel of plastering hair, and the manner of putting up this hair is as follows: A bushel of hair is placed loosely in a paper sack, and then a number
44 of these sacks, each containing a bushel, and placed side by side, and are pressed together with a machine for that purpose, thereby reducing the bulk very much in size, and the packages, after being so compressed, are bound together in a form convenient for transportation. The claim is for a bale of plasterer's hair, containing several packages or bundles enclosed in a paper bag or similar material, and the whole united, compressed, and secured to form a package in accordance with the specifications.

Q. 3. Please examine the bale before you and marked Compl't's Exhibit B and state whether you find said bale contains the elements and features specified in the aforesaid letters patent, and more particularly named in the claim thereof, and if it differs from the patent in any particular, state in what particular it differs, and whether that difference, in your opinion, is a material difference, giving your reasons in full for such opinions as you may express.

A. I find Complainant's Exhibit B to be a bale of plastering hair, composed of five different packages, each package containing a quantity of plastering hair, the whole united, compressed together, and done up

into one package in the same manner and form as is described in Complainant's Exhibit A. I should say that this bale of plastering hair corresponded with the bale described in the specifications, and
45 particularly the claim in the letters patent in said Exhibit A. I do not find any material difference between this bale shown me and the bale mentioned in the letters patent. I will add that each one of the packages that compose this bale is enclosed in a paper bag in the same manner that is described in the letters patent.

Q. 4. Please examine the bale that is before you and marked Complainant's Exhibit C, and state whether you find that to be like or unlike the bale shown and described in the aforesaid letters patent, and more particularly specified in the claims thereof, and if it is unlike it, state in what respect, and give your reasons for such opinions as you may express.

A. I have examined Compl'ts Exhibit C, and find it to be a bale of plastering hair composed of five different packages, enclosed, united, compressed, and secured in a manner corresponding to the bale described in said letters patent, and more particularly in the claim thereof, and I am unable to discover any material difference between this bale now shown me marked Exhibit C and the bale marked Exhibit B and the bale described in the specification in said letters patent, and more particularly made the claim under said specification.

46 Q. 5. Are you accustomed to examining specifications and drawings of patents with a view of determining what mechanisms or articles of manufacture or compositions of matter are shown and described therein, and have you previously testified in patent suits?

A. I have spent considerable time of late in examining specifications and drawings of patents with a view of testifying, and have testified as an expert in the litigation of patents.

Q. 6. Are you in any way interested in the termination of this suit, either as attorney or otherwise? If you are, state how.

A. I am not.

Cross-examination by Mr McCoy, of counsel for defendants:

X Q. 1. Mr. Tallcott, you say you are an attorney at law; are you alone or are you in partnership with some one; if so, who?

A. I am in partnership in the practice of common law in chancery with Lewis L. Coburn; I have no interest in his patent business or patent litigation. I know nothing of his business so far as patent law business is concerned.

X Q. 2. Have you had experience in patent-right litigations as an attorney?

47 A. I have been in litigations where patents were incidentally involved, as to whether patents were valuable or not.

X Q. 3. How long have you been in the practice of law?

A. Twelve years since I was admitted in 1864.

X Q. 4. Are you or have you been a mechanic?

A. I am not, and never have been.

X Q. 5. What compositions of matter are shown and described in the Letters Patent Compl't's Exhibit A? Please describe them in your answer.

A. There are no chemical compositions of matter, if you mean that. There is a mechanical arrangement of matter by which its bulk can be greatly reduced without injuring the article for the purposes for which it is intended, and this is one object sought by the inventor in the invention; another is by the arrangement of the material; it is made

more convenient for the purpose of trade; it is also more convenient to handle on account of its being enclosed in paper bags—makes it cleaner for the person obliged to handle it. There is less waste, also. These are among the improvements that are accomplished by the inventor.

X Q. 6. Will you please state, as an expert, briefly what this patent or device is? State in as few words as possible, without giving the advantages or disadvantages of the results or product of the patent.

48 A. This is a device for putting up plastering hair in a condition, form, manner, and size convenient for the wants of the trade and for consumers.

X Q. 7. Now, please state what mechanism or principle of mechanics compose this patent to produce the article for the wants of the trade, as described in your last answer.

A. In the first place, the hair must be properly prepared for being put in manner as shown in the letters patent, but this is not anything claimed in the letters patent. Then, after it is so prepared, it is put into bags, or some other receptacle, to the amount of one bushel in each bag or receptacle. The bushel is the unit of trade in plastering hair, and what the inventor has accomplished in this patent is to combine, arrange, and compress these different packages in the form that he has described in his letters patent. It's a mechanical arrangement of a number of packages, put up in a form and of a weight that is also described in his letters patent. There is no principle of mechanics involved that I know of, but it is a mechanical combination and arrangement of plastering hair in a manner that is new, novel, and useful, and therefore patentable.

X Q. 8. Please state what new application of mechanics or mechanical combinations or arrangement the inventor of this patent has given to the world by these letters patent.

49 A. Plastering hair is dirty, inconvenient to handle, and is liable to suffer a good deal of waste in being sold by a retail dealer to his customers in bulk. By this invention these difficulties that I have just mentioned are obviated. I should say that the mechanical arrangement of baled plastering hair described in said letters patent was useful and convenient. I am unable to state whether it is new or novel.

HARVEY H. TALLCOTT.

Further taking of testimony is hereby adjourned over until Monday, Oct. 23rd, 1876, at 10 o'clock a. m.

Met pursuant to adjournment. Further taking of testimony was adjourned over until Oct. 25th, at 3 p. m.

Met pursuant to adjournment Oct. 25th, at 3 p. m.
Present as before.

Deposition of William Kerr.

WILLIAM KERR, the next witness, being duly sworn, deposes and says, in answer to interrogatories propounded to him by L. L. COBURN, of counsel for complainant, as follows:

Q. 1. What is your name, age, residence, and occupation?

A. William Kerr; age, 37; residence, Chicago; occupation, merchant.

Q. 2. Do you know the parties to this suit, or either of them; and, if you do, how long have you known them, or either of them?

50 A. I know Mr. King; have known him for ten years; I do not know the other parties.

Q. 3. Have you had any business transactions with Mr. King; and, if you have, in what line of business?

A. Yes, sir; in the plastering-hair business.

Q. 4. Did you purchase plastering hair of him; and, if so, in what form or kinds of packages was the hair put up in that you so purchased?

A. Yes, sir. I have purchased hair put up in large bales, and also hair pressed in small bales in paper packages.

Q. 5. Please look at the letters patent issued to Wendell R. King, Compl't's Exhibit A, and state whether the bales of plastering hair which you purchased of him that were pressed and composed of small paper packages were substantially like the bale shown in said letters patent.

A. They are substantially the same.

Q. 6. Please state how extensively said bales have gone into use, and give the reasons which you have found in your experience as a merchant why they are preferable to other methods of putting up and handling plastering hair.

A. There is a very great demand for these bales, and they have almost entirely superseded hair put up in any other way. They are

51 convenient to handle; they are free from dirt and filth; they are just about the sized bales that are wanted in the country, and it saves the loss of hair that is incurred in the handling of other kinds of bales.

Q. 7. Please examine the bale of plastering hair marked Complainant's Exhibit C, and state whether it is like or unlike the bale shown in the letters patent Compl't's Exhibit A and the bales which you have bought of Mr. King; and, if it is unlike them, state in what respect.

A. It is put up in precisely the same manner as those which I have bought of Mr. King, which are shown in his letters patent.

Q. 8. Does the bale Exhibit C have all the qualities of merit possessed by the bale described in said letters patent? and, if it does, explain why they overcome the objections of dirt and filth in handling, and the wastage, of which you have spoken.

A. Yes, sir; I should say it did. It has not to be opened when it is sold, and consequently the hair is not exposed at all, and you do not have to handle the hair at all any more than the handling the packages.

Q. 9. What is the unit of sale in selling plastering hair?

A. A bushel of eight pounds of dry hair.

52 Q. 10. When you sell hair put up in the old ways, what do you practically do with the hair before the customer takes it away that is avoided when you deal in hair put up in bales like Exhibits B and C?

A. We have to take it out of the sack loose and weigh it, and then put it up in sack or paper; all of which is avoided by the other bale.

Q. 11. Is there any difference in price, as a general thing, between hair put up in King's patented bales like Exhibits B and C and the old packages; and, if so, what is it?

A. Yes, sir; there is from eight to ten cents per bushel difference. The baled hair like Exhibits B and C are worth the most.

Q. 12. Do you consider that there is any special value or advantage

in having plastering hair baled in bales of bushel paper sacks, substantially as shown and described in patent Compl't's Exhibit A? if so, state your reasons for so considering.

A. Yes, sir. One great advantage is the fact that you get a greater amount of hair in a small package, and thereby save freightage in shipping. Then the avoiding the dust and dirt attending the handling of hair. other ways and avoiding the loss from wastage.

Cross-examination waived.

WILLIAM KERR.

Adjourned over till October 30th, at 4 o'clock p. m.

53 MONDAY, *Oct. 30th*, 1876—4 p. m.

Met pursuant to adjournment.

Deposition of Albert E. Neely.

ALBERT E. NEELY, the next witness, being duly sworn, deposes and says as follows, to wit:

Q. 1. What is your name, age, residence, and occupation?

A. Albert E. Neely; 49 years; Chicago; merchant.

Q. 2. Are you acquainted with the parties to this suit, or either of them; if you are, how long have you known them, or either of them?

A. I am acquainted with Mr. King; have known him for about twenty years. I do not know the defendants.

Q. 3. State what you know in reference to Mr. King, the complainant, making and selling bales of plastering hair.

A. I know that Mr. King has been engaged in pressing hair and dealing in hair for a great many years.

Q. 4. What kinds of bales of plastering hair has he made and sold; and, if of different kinds, which kind did he first make?

A. He has made them in five-bushel bales, in three-bushel bales, and one-bushel bales. The five-bushel bales are put up in burlaps for covering; the three-bushel bales are also put up in burlaps. The one-bushel bales are put up in paper, and I might explain that five one-bushel bales or packages are put together and compressed into
54 a five-bushel bale.

Q. 5. Has this last-described bale, which consists, as you have stated, of several one-bushel paper packages, any properties or qualities that makes it better or more convenient than the burlaps bales or the loose sacks, such as were formerly sold; and, if so, what are they?

A. They are more merchantable than the other kind, for the reason that they are of a more convenient size for most consumers. Being divided into one-bushel packages makes it more convenient than the others.

Q. 6. Now, will you explain what is ordinarily done in retailing the other kind? and if there is any inconvenience or nuisance that is obviated by the use of this bale, state what it is.

A. In selling the other kinds, if the sales were of less quantity than the entire package, each lot would have to be weighed, which frequently is quite inconvenient for dealers; also there is a good deal of dust which is obviated by selling the bales composed of one-bushel packages.

Q. 7. Does the user generally use as much as three or five bushels of hair at a time, that is in one batch of plaster? In other words, is there a demand created, in your opinion, for the bales like Exhibit B, on ac-

count of convenience to the user, as well as a saving in wastage
55 occasioned by tearing the old kind of bale to pieces in getting the hair out as it is wanted?

A. In small jobs there would not be as much as three or five bushels used. The greater convenience of the paper bales makes them greatly in demand; a much larger quantity of hair can be sold in packages of that kind than in the others.

Q. 8. Have you dealt in plastering hair? and, if you have, state, if you know, whether Mr. King has built up a large and extensive trade in plastering hair bales like Exhibit B.

A. I have dealt in it for about 20 years, and know that he has built up a large trade in the bales of the kind mentioned.

Q. 9. Do you as a merchant consider that bale Exhibit B a useful and valuable improvement over the other bales and modes of putting up plastering hair?

A. I do.

ALBERT E. NEELY.

Here follows certificate of special examiner.

56 [65.]

DEPARTMENT OF THE INTERIOR.

[Coburn & Thacher, 52 Ashland block, Chicago.]

U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Wendell R. King, dated June 30th, 1874, No. 152560, for imp't in baling plastering hair.

In testimony whereof I, W. H. Doolittle, acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

57 No. 152560.

The United States of America to all to whom these presents shall come:

Whereas Wendell R. King, of Chicago, Illinois, has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in baling plastering hair, a description of which invention is contained in the specification, of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said Wendell R. King, his heirs or assigns, for the term of seventeen years from the thirtieth day of June, one thousand eight hundred and seventy-four, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

C. DELAN),
Secretary of the Interior.

Countersigned:
[L. S.]

M. D. LEGGETT,
Commissioner of Patents.

(Here follows diagram, marked page 58.)

59 UNITED STATES PATENT OFFICE.

Wendell R. King, of Chicago, Illinois. Improvement in baling plastering hair. Specification forming part of letters patent No. 152560, dated June 30, 1874. Application filed August 25, 1873.

To all whom it may concern:

Be it known that I, Wendell R. King, of Chicago, in the county of Cook and State of Illinois, have invented certain improvements in baled plastering hair, of which the following is a specification:

It is found that the wants of the trade in plastering hair require it to be compressed for transportation in packages of from three to five bushels. This amount of hair forms a package of a good size to conveniently handle, weighing from twenty to forty pounds. The trade unit for the article of plastering hair is always the bushel. It is sold by the bushel or by a multiple thereof. Heretofore this hair has been packed in a mass of a certain number of bushels baled together, varying in amount as the order required, so that when received the retail dealer was compelled to parcel out the same and weigh it to suit his customer. This is a disagreeable and difficult thing to do, as the hair is dirty and matted together, and after it is once removed from the case, into which it has been compressed by a baling-press, is bulky and not easy to reduce again to a convenient package. For this convenience of the trade I purpose to form the hair in small bundles of one bushel each, and unite several bundles into a bale of a convenient size for transportation. I first place a bushel of hair into a paper sack loosely, or only so far packed as may be readily done by hand. Several of these one-bushel packages are then placed side by side in a baling-press. I use for this purpose the baling-press heretofore patented to me. They are thus compressed forcibly together, so that the bale produced will be a compact firm bale, occupying only about one-fifth of the original bulk. The paper bags, which still envelop the individual bushels of the bale, keep said bushels separate, and serve at the same time to protect the hair. The bale, after being compressed, is tied in the usual way, and is then in shape for transportation without further covering, although it may be desirable, if the bale is to be sent a long distance, to envelop it in a stout sacking cover. Hair baled thus may be separated by the retail dealer into bushel packages, each of which remains compressed into a small size, and is in convenient condition to handle.

In the accompanying drawing, which forms a part of this specification, figure 1 is a perspective view of one of the bundles, containing a bushel, before being baled and compressed. Fig. 2 is a view of a bale

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W. R. KING.

Baling Plastering Hair.

No. 152,560. Patented June 30, 1874.

fig. 1.

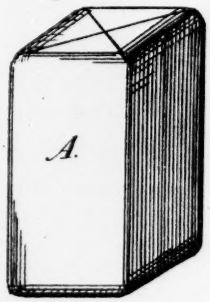


fig. 2.

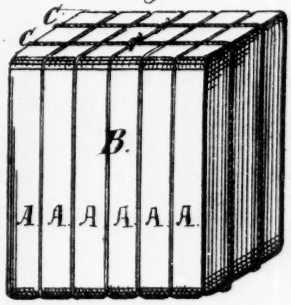
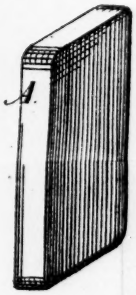


fig. 3.



Witnesses:
D. N. Heerbrat
Heinrich F. Brunn.

Inventor:
Wendell R King
by Coburn & Mundy
his Attorneys

formed of several of said bundles compressed and secured, ready for transportation. Fig. 3 is a view of one of the bushel bundles as it appears after being removed from the bale.

In the said drawing, A represents the bushel bundles incased in paper bags or equivalent material. B is the bale, formed of several of said bushel bundles, compressed side by side in a press, and secured in some proper way, as by the cords C.

In baling the hair it may be weighed when it is placed in the paper bags, to ascertain when the bushel is complete. The weight of a bushel of hair varies according to the laws and customs of various localities, but always is reducible to pounds, being measured by weight and not by quantity.

Having thus described my invention, I claim—

As an article of manufacture, the bale B of plasterers' hair, consisting of several bundles, A, containing a bushel each by weight, inclosed or incased in paper bags or similar material, and united, compressed, and secured to form a package, substantially as specified.

WENDELL R. KING.

Witnesses:
HEINRICH F. BRUNS,
JOHN W. MUNDAY.

(Indorsed:) Complainant's Exhibit A. L. A. Bunting, special examiner.

60 DEFENDANTS' TESTIMONY.

United States circuit court, eastern district of Wisconsin.

WENDELL R. KING
vs.
AUGUST GALLUN & ALBERT TROSTEL. } In equity.

At Milwaukee, Wisconsin, on the 27th day of April, A. D. 1877, before me, Gottlieb Engel, a notary public, pursuant to stipulations hereto annexed, testimony was taken on behalf of the defendants, at my office in said city, commencing at 3 o'clock p. m. Present F. C. Winkles, esq., of counsel for complainant, and Joshua Stark, esq., counsel for defendants.

Deposition of D. V. Fischbeck.

D. V. FISCHBECK, the first witness in behalf of the defendants, being duly sworn, deposes and says, in answer to interrogatories to him propounded by JOSHUA STARK, as follows, to wit:

Q. Where do you reside?

A. West Water st., Milwaukee, Wis.

Q. What is your name, age, and occupation?

A. I am 26 years of age, and am a leather dealer; my name is D. V. Fischbeck.

Q. How long have you been in the leather business?

61 A. Eight years with my father in Milwaukee, in the firm of D. Fischbeck.

Q. Have you during that time dealt in plastering hair?

A. Yes; for the last seven or eight years.

Q. Where has your trade in plastering hair been?

A. Chiefly in the country, in Wisconsin, Minnesota, and Iowa.

Q. Do you know the compressed bales of plastering hair as put up by the complainant, King?

A. Yes; we have handled it.

Q. Did you purchase it of him?

A. Yes; of his agent in this city.

Q. How long is it since this hair was put up by King in these bales?

A. We have had it for about five years.

Q. Has he put it up in different kinds of bales?

A. He has put it up in burlaps and in small paper sacks.

Q. What were the packages in burlaps?

A. They were forty-pound pressed bales.

Q. How were the paper sacks put up?

A. Five pressed together and tied up in one bale, each sack containing eight pounds.

Q. How long have you known King to put up packages in the form last described?

A. About five years.

Q. What has been Mr. King's difference in price of baled hair put up in burlaps and that put up in bale of paper sacks?

62 A. Ten or fifteen cents per bale of forty pounds each. I think that was when we bought the hair of Pfister; he made that difference to us, and he got it of the complainant, King.

Q. What difference has King made to you in price?

A. I don't recollect; King has not put up hair in burlaps packages for the last two or three years.

Q. Did you keep the baled hair in both kinds of packages?

A. Yes, sir.

Q. In which bale or kind of package was it most salable?

A. When we handled both it was about the same; the demand was about equal for both kinds.

Q. What advantage is there in the bales of paper packages over the burlaps?

A. The convenience of selling in small quantities.

Q. Is there any definite rule as to the quantity in which hair is sold?

A. It is sold by bulk in barrels; more usually by weight.

Q. Is the hair any better by reason of its being compressed in packages?

A. No, sir; it is no better; on the contrary, it is often spoiled; it has happened that it rots because of its not being dry when compressed; I have not found any such difficulty with King's hair for the last two or three years.

63 Q. What is the advantage, if any, of putting up plastering hair in pressed bales?

A. It costs less to transport it.

Q. Apart from the difference in transportation, is hair worth more pressed than when put up loose?

A. There is a difference of about three cents per bushel, which is the cost of putting it up. The difference in King's quotation is four cents a bushel; that is, the difference between loose or barrel hair and paper sack pressed hair; the cost is rather less than more than three cents.

Q. Is there any objection to pressed hair aside from the liability to rot?

A. I don't think there is.

Q. Does King sell hair except at wholesale?
A. He sells it both wholesale and retail.
Q. What do you mean by King's quotation?
A. I never saw any of King's circulars. I enquired of King's man about an hour ago as to difference in price, and he said it was four cents a bushel. He at the same time said that he put the best hair in the paper sacks and the poorest in barrels. I refer to Mr. Archer, King's superintendent in Milwaukee.
Q. Has there been a greater difference in Mr. King's price before?
A. I don't know.
Q. Have you known the price of loose hair in barrels for the last five or six years?
A. I have.
64 Q. What has been the difference in price between barrel hair and King's baled hair in that time?
A. There was a difference of five or six cents five or six years ago; in the latter years the difference has been smaller. I think the difference was smaller because he wished to force the sale of baled hair.
Q. When the difference was five cents or more, in which shape was the hair preferred by customers?
A. They preferred it loose, that is only three or four years ago.
Q. Is it common to put up hair loose in paper sacks?
A. Four or five years ago, when the difference in price was so great, customers bought the hair loose and put it up in paper sacks themselves for their trade. In what quantities they sacked it I don't know.
Q. Have you seen other articles of merchandise put up for sale in pressed packages, or in several small packages pressed together in a large package or bale?
(The counsel for complainant objects to the question because the testimony is immaterial, and because no proper notice has been given thereof in the answer.)
A. Yes, sir; different kinds of goods, for instance, shoe-thread, sailors' hemp, tobacco.
Q. Describe the manner of putting up shoe-thread.
65 (Objected to by counsel for complainant for the same reasons above.)
A. The thread is put up in three-pound packages wrapped in paper, and thirty-three of those packages are pressed together in a bale and burlaped, sewed up in coarse canvas.
Q. Describe the manner of putting up sailors' hemp.
A. I cannot do it. I have seen the bales, but do not know how it is put up; most threads are baled in pressed bales containing a number of packages, each of a given weight.
Q. How long has this mode of baling thread, twine, &c., in pressed bales, been in use?
(Objected to by counsel for complainant for same reasons as above.)
A. As long as I can recollect; I can recollect for fifteen years back, I think.

Cross-examined by counsel for complainant:

C. Q. Are you dealing in plastering hair now?
A. Yes, sir.
C. Q. Whose hair are you dealing in?
A. In the hair manufactured by King, and in loose hair.
C. Q. Who did you buy the loose hair of?
A. Of different tanners, in and out of town.

C. Q. At what price do you sell loose hair?
A. Twenty to twenty-one cents per bushel in the barrel.
66 We sold it last fall for twenty-two cents.
C. Q. How much do you sell baled hair at?
A. Twenty-three to twenty-four cents, to-day.
C. Q. When did you sell any?
A. About a week ago.
C. Q. To whom did you sell that?
A. To a man in Reedsburgh, Wisconsin.
C. Q. Are you sure as to the price?
A. Yes, sir.
C. Q. What was the price?
A. Twenty-five cents.
C. Q. Did you sell any at twenty-four cents?
A. No, sir; but that is our price now.
C. Q. What is your price for loose hair now?
A. Twenty to twenty-one cents.
C. Q. At what price can you buy baled hair now of Mr. King?
A. At twenty cents cash.
C. Q. At what price can you buy loose hair now?
A. At nineteen cents.
C. Q. Can you buy it cheaper?
A. Yes, sir.
C. Q. How cheap?
A. Fifteen cents.
C. Q. Good quality?
A. No, sir.
C. Q. Is that the cheapest that you can buy?
A. Yes, sir.
67 C. Q. Can you state definitely when paper bales first came into market?
A. No, sir.
C. Q. Can you state that it is more than four years ago?
A. Yes, sir; I think I can.
C. Q. When was it?
A. It was about four years ago; my impression is that it is four years or more. I am not positive as to time.
C. Q. Is there any one putting up hair in burlaps bales now?
A. No, sir.
C. Q. Do you know of any one putting up pressed hair now?
A. Yes, sir; I understand Trostel & Gallun.
C. Q. In what manner do they put it up?
A. I cannot tell.

D. VICTOR FISCHBECK.

Deposition of William Fink.

WILLIAM FINK, the next witness, being duly affirmed, deposes and says, to questions proposed by JOSHUA STARK, as follows:

Q. What is your name, age, and occupation?
A. My name is William Fink; am fifty-one years of age; and am in the hide and wool business.
Q. How long have you been in this business?
A. About twenty-seven years in all; for the last ten years as one of the firm of W. & H. Fink, in the city of Milwaukee.
Q. Have you during this time dealt in plastering hair?

68 A. Yes, sir.

Q. In what shape is it put up?

A. In barrels and coffee sacks, and also in paper bags pressed for wholesale trade; for retail trade we put it up as the customers want it.

Q. How long since forty-pound bales in burlaps are in the market?

A. I can say exactly; I think ten or twelve years; I have not seen any for three or four years; I can state exactly.

Q. What is the difference for the last five or six years in price between hair pressed in paper sacks and barrelled hair of equal quality?

A. There is no established price; the price fluctuates; I had a private agreement for the baled hair with King.

Q. What was the usual difference in this market between the baled hair and the hair in barrels?

A. I don't know.

Q. What difference have you made in the last five or six years between the hair pressed in paper sacks and loose or barreled hair?

(Objected to by counsel for complainant as immaterial and incompetent.)

A. I never made a greater difference than three cents a bushel.

Q. Where has been your principal trade?

A. All over; in the city and country.

Q. Do you know what King was charging others?

69 A. I do not.

Q. What do you consider the advantage of pressed hair over the loose?

A. I do not know of any.

Q. Is pressed hair better than loose hair?

A. Not if it is of the same quality.

Q. What is the benefit of pressing hair?

A. It is in transportation, being the difference in weight of the barrel in which the loose is placed and the paper in which the pressed hair is placed.

Q. What is the difference in value between the burlaps bales of forty pounds and a forty-pound bale of paper sacks?

A. I would just as leave have it in barrels as in forty-pound burlaps bales, except the difference in the cost of transportation of the barrel.

Q. What is the advantage of putting up bales of compressed hair composed of five-bushel sacks?

A. The difference is three cents for the convenience of retailing in small packages. You can offer a man the same quantity in barrels as in packages and he will prefer the barrel hair at the same price, because the barreled hair is more convenient for them.

Q. How long has hair been put up in bales of paper sacks?

A. I don't know.

Q. Is the practice of putting up articles of merchandise in bales composed of several packages pressed together new, or confined to plastering hair?

70 (Objected to, because incompetent, and because no proper notice thereof has been given in the answer.)

A. Not new to me.

Q. What other articles are put up in such packages?

(Objected to, for the reasons above mentioned.)

A. Australia and California wool, hides, hay, and thousands of other articles.

Q. How is Australia and California wool pressed?

(Objected to, for the reasons above.)

A. In bales of from four to six hundred pounds, composed of several fleeces pressed together.

Q. How is shoe-thread put up?

(Objected to as above.)

A. In bales of ninety-nine pounds, containing thirty-three cards of three pounds each, pressed together to form the bale, and covered with burlaps. Each card is wrapped separately in paper. Hides are also pressed together in bales, each hide constituting a package within the bale.

Q. How long have you known shoe-thread and wool to be put up in this manner?

(Objected to as above.)

A. As long as I have known anything of the hide and wool business.

Cross-examined:

C. Q. Who first introduced plastering hair pressed in bales of paper sacks?

71 A. Mr. King.

C. Q. Is not the hair put up in those bales a desirable article of merchandise?

A. To a certain extent.

C. Q. Is it not for certain purposes a more desireable form than any other in which plastering hair has been sold?

A. For one purpose only; for the small retail trade.

C. Q. Can you not state in what year you first sold packages of this kind?

A. Since Mr. King has made them.

C. Q. Can you state how much hair you have sold in barrels in proportion to that in sacks?

A. I sold a great deal more in barrels than in sacks every year. As a friend of Mr. King, I have sold as much in sacks as I could. My city trade has been mainly in barrels; that trade is mostly to masons. I have sold more to country dealers in barrels than in sacks.

C. Q. Do you keep hair on hand all the time?

A. I do, both in bales and in barrels.

C. Q. To what places in the country do you chiefly sell hair?

A. To whatever places I get orders from.

C. Q. Will you answer my question specifically?

A. I decline, because it might hurt my trade.

72 Redirect by Mr. STARK:

Q. Why do you decline to answer specifically in what places the customers who buy your hair live?

A. Because it is a business secret. My customers live all over Wisconsin and the adjoining States.

Cross-examination:

C. Q. How much hair did you sell in 1876?

A. I cannot tell.

C. Q. What is your chief business?

A. Hides, skins, wool, furs, plastering hair, and leather.

WM. FINK.

Adjourned over until 2 o'clock, Saturday, April 28th, 1877.

Deposition of Julius Gaenslen.

JULIUS GAENSLEN, the next witness, being duly sworn, deposes and says, to questions propounded by JOSHUA STARK, as follows:

Q. What is your name, age, and occupation?

A. Julius Gaenslen; am thirty years of age; and am a leather dealer in Milwaukee, Wisconsin.

Q. How long have you been in this business?

A. Three years in the city of Milwaukee; before that I was a tanner.

Q. Do you know the packages of baled plastering hair put up by the complainant, King?

A. I have seen the bushel packages, five pressed together in one bale.

Q. How long have you known that form of package?

73 A. Two or three years.

Q. Have you dealt in plastering hair since you have been in the leather business?

A. Yes, sir.

Q. Have you dealt in baled hair?

A. No, sir.

Q. Do you know the prices of hair in this market during the last two or three years?

A. Yes, sir.

Q. Has the baled hair commanded a better price than the unpressed?

A. Yes; about five cents a bushel.

Q. Is it superior in quality?

A. I cannot tell.

Q. What is the advantage of pressed hair?

A. It is more convenient for shipping.

Q. Does baling the hair improve or preserve it?

A. I don't think it does.

Q. In which shape has there been the greatest demand, in pressed packages or unpressed?

A. We never had much demand for pressed hair.

Q. The unpressed packages are put up in what shape?

A. In barrels and sacks; crammed in without a press.

Q. Do you retail hair?

A. Yes, sir.

Q. Why do you not keep pressed hair?

74 A. Because it is too high in price. So long as my customers are satisfied with loose hair I do not see the use of paying five cents more for pressed hair.

Q. In which shape do consumers in the city prefer the hair?

(Objected to as being immaterial.)

A. We never had any call for pressed hair.

Q. In what quantities is hair retailed?

A. In any quantity, as desired; half bushel, bushel, or any quantity. It is sold by the bushel.

Q. How do you determine the quantity making a bushel?

A. Eight pounds to a bushel.

Q. In selling small quantities, in what shape is it generally put?

A. Customers generally bring a barrel or sack with them.

Q. Have paper sacks been long in use to put loose hair in?

A. Not that I know of.

J. GAENSLEN.

D. V. FISCHBECK recalled.

Q. Can you now state when you first bought from complainant pressed hair in paper sacks?

A. Yes, sir; I bought it in May, 1873. Bought on the same day of King pressed hair in forty-pound bales in burlaps; there was no difference in price then.

Q. How long was it before there was a difference made in price?

A. I don't find any difference to have been made by King. I
75 have three of his bills, one six or eight months later than the first. No difference was made in price in these three bills by King between the paper sacks and the forty-pound bales in burlaps.

Cross-examined by Mr. WINKLES:

C. Q. Were there both kinds of hair in each of the three bills?

A. The bills don't show how the bales were made up. I find by tracing the rate of the first bill that it was half of each kind.

C. Q. Have you traced the other two bills?

A. No, sir.

C. Q. Then you do not know whether those two bills were all of one kind or of two kinds of bales?

A. I don't know.

D. VICTOR FISCHBECK.

Deposition of Christian Anstedt.

CHRISTIAN ANSTEDT, the next witness, being duly sworn, deposes and says to questions propounded by Mr. STARK:

Q. What is your name, age, and occupation?

A. My name is Christian Anstedt; am forty-five years of age, and am a leather dealer; have been in the leather business for seven years, and was a tanner before, in this city.

Q. Have you dealt in plastering hair?

A. Yes, sir.

Q. Have you known the packages of pressed hair put up by the complainant, King?

76 A. Yes, sir.

Q. Have you known both his forty-pound bales and his one-bushel paper sacks?

A. I have seen the forty-pound bales, but have handled only the bushel paper sacks.

Q. From whom did you get them?

A. From Mr. King.

Q. Have you also sold hair in other forms?

A. Yes, sir; in barrels and in sacks.

Q. What has been the ordinary difference in price between the pressed and unpressed hair?

A. About four cents a bushel.

Q. What was the cause of the difference?

A. The hair packed in paper is cheaper for outsiders on account of less freight.

Q. Was there any difference in value between the one-bushel paper sacks and the forty-pound bales?

A. There was about two cents a bushel; I don't know the reason of that difference.

Q. Is the hair any better in those packages?

A. No, sir; neither does it keep any better when pressed; pressed hair is as good as unpressed hair if it is dry when pressed.

Q. Is there any advantage in putting up hair in pressed paper sacks of a bushel each; and, if so, what is it?

A. The advantage is, that it is handier for dealers in retailing.

CHRIST. ANSTEDT.

77 *Deposition of Geo. A. Hadfield.*

GEORGE A. HADFIELD, the next witness, being duly sworn, deposes and says, in answer to questions put by Mr. STARK, as follows:

Q. What is your name, age, and occupation?

A. My name is George A. Hadfield; am thirty years of age, and dealer in lime, plastering hair, and other materials; have been in this business two years in this city; have been in this business about five years in all in this State.

Q. Have you known the complainant King's pressed plastering hair?

A. Yes, sir; have dealt in it.

Q. Have you known the five-bushel burlaps bales and the bale of one-bushel paper sacks?

A. Since I came to this city, two years ago, I have known both forms.

Q. What has been the difference in value between unpressed hair and these pressed bales of five bushels?

A. Last year we paid about twenty-five cents a bushel for the baled hair, and from sixteen to twenty cents for the loose hair.

Q. What do you mean by the baled hair?

A. Hair pressed in bales or other packages.

Q. Was there that difference between loose and pressed hair of equal quality?

A. Yes; there was about that difference; persons in the city would generally buy that in barrels; persons in the country that which
78 is pressed; persons in the city took it in barrels because the price was less and the quality just as good as the pressed.

Q. Did you buy hair of as good quality as the pressed for sixteen cents last year?

A. Yes; the barreled hair seemed to give as good satisfaction as the baled hair. I think the price of the unpressed hair would average nearer to twenty cents than to sixteen cents.

Q. What difference, if any, in price was made between the forty-pound bales and the bales of paper sacks?

A. I don't think we did discriminate in the price between single bales and bales of several packages; we have handled both kinds.

Cross-examination:

C. Q. Can you swear that you have, within the past two years, handled baled hair that was not put up in separate packages of one-bushel paper sacks?

A. I think I can be safe in saying that we did; I judge from our books; the books I don't think show how the packages were put up.

C. Q. From what do you judge that you have dealt in that hair?

A. From statements of my brother, who informed me that
79 packages we bought from Trostel & Gallun in 1875 were all in one package of forty pounds. Last year I attended to the business personally.

C. Q. Did you last year, when attending to the business personally, handle such packages?

A. I could not say. The hair business is only a small part of our business.

C. Q. Can you swear that in 1875 you paid the same price to Trostel & Gallun for their forty-pound bales that you did to King for his bales put up in paper sacks?

A. I can not.

G. A. HADFIELD.

Deposition of Geo. I. Schmidt.

GEORGE I. SCHMIDT, the next witness, being duly sworn, deposes and says, in answer to questions propounded by Mr. STARK, as follows:

Q. What is your name, age, and occupation?

A. My name is George I. Schmidt; am sixty-five years of age; am a leather dealer; have been such since 1865, in Milwaukee. I dealt in plastering hair eight years; have handled most of it in barrels and coffee sacks; have not dealt in pressed hair, except a little I bought of a man who bought it at auction once. My trade in hair has been mostly in this city; also sold to country customers to some extent.

80 Q. Do you know what difference there has been in pressed and unpressed hair in the last three or four years as to market value?

(Objected to, witness not having dealt in pressed hair.)

A. In my business I would not give one cent more for pressed hair than loose hair. I would rather buy the loose hair, because I can see the quality.

Q. What advantage is there in putting up hair in pressed packages of a bushel each, in paper sacks?

A. I don't know; there is no advantage for me.

Q. How is plastering hair retailed?

A. By the pound, half bushel, bushel, or in such quantities as customers desire. It is sold by weight.

Q. Do you know of other articles being put up in bales of several packages put together.

(Objected to as immaterial, and because no proper notice was given thereof in the answer.)

A. Shoemaker's thread; but I don't think that is pressed; that is all that we handle.

GEORGE I. SCHMIDT.

Adjourned over until 2 o'clock, Monday, May 1st, 1877.

Deposition of August Frank.

AUGUST FRANK, being duly sworn, deposes and says:

Q. What is your present business?

A. I am in the dry-goods trade, and have been in that business in the city of Milwaukee, for 24 years.

81 Q. Have you known of articles pressed into bales containing several packages or buudles? If so, state particularly in reference to the same.

(Objected to by complainant's counsel as immaterial, and because no notice thereof has been given in the answer.

A. Yes; this carpet warp is put up in 5-pound packages, and one

bale contains twenty-four packages pressed together and sewed into burlaps, wrappers put about the bale. Each bundle of five pounds in the bale is pressed also; a bundle contains 20 or more skeins, the number of skeins in a bundle depending on the fineness of the warp, but each bundle always containing five pounds. This method of baling warp has been in use for five years to my knowledge. We get our sheetings and other domestic dry goods baled in pressed bales containing twenty or more pieces in a bale of sheetings, or a less number of other goods. The same is true of grain bags, of which we get 100 pressed in a single bale.

Q. How long have you known this method of putting up sheetings and other dry goods?

(Objected to as above.)

A. We have always received them in that form, as long as I have been in that business.

Q. How are cotton bats put up?

(Objected to as above.)

82 A. Well, they are put in pound and half-pound bundles, rolled up in paper wraps, with ends open. These packages are put in bales of fifty and a hundred each, some of them tied very tight, and others more loose; cannot say whether the bales are pressed or not. About twenty years ago we imported yarns from Europe, which were put up the same as the carpet-warp. There were five pound packages, containing each ten to twenty skeins of uniform weight, pressed together, and tied and wrapped in paper; these five-pound packages were put together in bales of a hundred pounds each, the bales were tied very tightly with cord, having the appearance of having been pressed together before they were tied.

Cross-examination by Mr. WINKLER:

Q. I understand that in speaking of different articles having been put up in pressed packages, you judge entirely from the appearance of the packages and bales, and have not yourself seen them put up; is that correct?

A. Yes, sir.

Redirect by Mr. STARK:

Q. What in the appearance of the packages and bales spoken of caused you to speak of them as pressed?

83 A. Because they were so tight they could not have been made so by hand; also their shape.

AUGUST FRANK.

Deposition of Gottlob Bossert.

GOTTLOB BOSSERT, being duly sworn, deposes and says:

Q. Do you reside in Milwaukee?

A. Yes, sir; I am secretary of the Pfister & Vogel Leather Company, and have been in the hide and leather business for 20 years in this city.

Q. Have you dealt, during that time, in plastering hair?

A. We have dealt in plastering hair all of that time; we first handled the hair put up loose in bags and barrels; by loose, I mean not pressed with the aid of machinery. For the last ten to twelve years we have handled it pressed, occasionally selling a loose package in a barrel or sack.

Q. How long have you handled plastering hair put up in bales of several packages?

A. I can't tell exactly; I think about 6 years. We have got all our pressed hair from the Illinois Leather Company in Chicago, of which the complainant, King, is the superintendent. The hair we get is pressed at the Milwaukee branch of that company.

Q. What has been the difference in price between hair pressed
84 in single bales and that in bales of several paper sacks, since the latter were in use?

A. The difference was two cents per bushel, or ten cents per bale of five bushels.

Q. How has the value of loose hair, dried and of equal quality, compared with that of the pressed hair during the same time?

A. We made a difference of from three to five cents a bushel in favor of the bales.

Q. What was the reason for the difference in the price between the two kinds of bales?

A. I have never made any inquiry about it. I don't think there was any difference in the quality.

Q. Was the baled hair put up by the Illinois Company of selected or superior quality?

A. I cannot answer that question. I did not examine the hair so closely.

Q. Has the complainant, King, made statements to you on that subject, in regard to the comparitive quality of the hair pressed in bales?

A. No; not any.

Q. What, if anything, has he said to you about the kind and quality of his pressed hair?

A. I don't know as he has said anything in particular.

Q. Do you know of other articles that are put up in bales composed of several packages pressed together?

(Objected to as immaterial, and because no notice thereof has been given in the answer.)

85 A. I don't remember any now, but there are plenty of such packages put up, but not in our line of business.

Q. Do you deal in shoe thread?

A. Yes, sir.

Q. How is that put up?

A. Put up in boxes, now; it used to be put up in bales, but not in pressed bales.

Cross-examination by Mr. WINKLER:

Q. How long is it since you have handled any bales in single packages without paper bags?

A. We have handled them very little for the last two years.

Q. Have not the bales in paper bags superseded them almost entirely in the trade?

A. They have, during the past few years.

Q. Are you positive that you have handled them previous to the year 1873?

A. I am not positive.

Q. Is that not the year when they were introduced here?

A. I cannot give the year.

Q. Who introduced them?

A. We got them first from the Illinois Leather Company; that is the first time I saw them in that shape.

86 Q. Is that a valuable method of putting up the hair for the purposes of the trade?

A. It is an easy way for those who sell them again, and is a handy way to put them up.

Q. Have you known any other parties who put them up in that shape?

(Objected to by Mr. Stark as not being proper cross-examination.)

A. Not of my own knowledge.

Redirect by Mr. STARK:

Q. Is there any advantage in putting up hair in pressed bales except the convenience in handling it?

A. The chief advantage is the saving in freight.

Q. Is there any advantage in the bales of paper sacks over the single bales or packages in the matter of freight?

A. No; there is no difference.

GOTTLOB BOSSERT.

Deposition of Elijah Shaw.

ELIJAH SHAW, being duly sworn, deposes and says:

Q. Where do you reside?

A. I reside in Milwaukee, and have been in the boot and shoe business for about 30 years.

Q. Do you know of any articles of merchandise that are put up in bales composed of several bundles or packages pressed together? If so, describe them.

87 (Objected to as immaterial, and because no notice thereof has been given in the answer.)

A. The only article I think of now in our business is shoe-thread; it is put up in paper packages, some 30 or 40 in a bale, each paper package containing three pounds of thread or 12 balls. It is my impression that the bales must be pressed together to get them as tight as they are. The bales are sewed up in burlaps. I refer to the old-fashioned shoe-thread, not to the machine thread. Such bales of shoe-thread have been used as long as I can remember.

E. SHAW.

Deposition of Chas. H. Ramien.

CHARLES H. RAMIEN, being duly sworn, deposes and says:

Q. What is your business?

A. I am a dealer in notions and fancy goods in Milwaukee for the last twenty years.

Q. During that time have you known of articles of merchandise that were put up for sale in bales, composed of several packages compressed together?

(Objected to as immaterial, and because no notice thereof was given in the answer.)

A. I have.

Q. Describe such articles and the manner in which they were put up.

88 (Objected to as above.)

A. We have zephyr wool; it is put up in quarter-pound packages in paper sacks. These packages are put together to make bundles of five pounds each. These bundles are pressed and tied. These

are imported goods from Europe. Shetland wool is an American article; it comes in bundles of five pounds or more each, composed of 12-ounce packages; each 12-ounce package is wrapped in paper, and they are pressed together to form the bundle, and tied. Knitting-cotton is put up in two-pound packages composed of eight skeins of 2 ounces each, compressed together and tied into a bundle. Linen thread comes also in pound packages, of which five or six are compressed together in a bundle. These come from England. These articles have been so put up as long as I have been in business. It is a regular and common way of putting up cotton, woolen, and linen goods which will bear compression. I think all of these articles have been put in a press, or they could not have been put in such compact shapes. I have seen linen and cotton articles put up with the aid of the press myself. I have also seen woolen yarn pressed.

CHARLES H. RAMIEN.

89 *Deposition of Chas. G. Stark.*

CHARLES G. STARK, being duly sworn, deposes and says:

Q. Where is your residence, and what is your business?

A. I have resided in Milwaukee about twenty-three years, and have been in the carpet and house-furnishing business for sixteen years, or more.

Q. Have you during this time known of articles of merchandise being put up for sale or shipment in bales composed of several parcels or bundles compressed and bound together? If so, state what articles, and how put up.

(Objected as immaterial, and because no notice thereof has been given in the answer.)

A. We get carpet-warps, cotton-battings, carpet-linings in such bales. Foreign carpets are all put up in that way. Carpet-warp is put up in packages of five pounds for convenience in selling, sometimes wrapped in paper, and sometimes not. Usually 100 to 120 pounds of such packages are put together in one bale. I think all such articles are put under a hydraulic press and tied with ropes when under pressure, the same as sheetings, tickings, and other like goods. Cotton bats are put in paper packages of from half pound to a pound each. They are put together in bales of from 50 to 100 pounds each. They are compactly put together and tied into
90 bales. I think they must be pressed some, as the bales are quite solid. The object of putting the packages of cotton batting in paper is for convenience and neatness in selling. If not enclosed in paper the cotton would adhere to other articles coming in contact with it, and I think it would be difficult to separate the parcels after they were placed together, unless they were enclosed in paper. Carpet-linings are made in strips of fifty yards, folded and tied at each end; four of these bundles are placed together and pressed tightly, then sewed and tied while in press, sewed up in a bale. Carpet thread is put up in skeins; thirty-two of these skeins make a pound package, and six of the pound packages are done up into a bundle; the bundles are very compact; can't say whether they are pressed or not; the separate pound parcels usually wrapped in paper. Burlaps are imported goods; they are in pieces of about 200 yards each, and are put up in square bales, ten or twelve pieces in a bale, very tighly compressed and iron bound. Horse blankets and most domestic goods are put up in pressed bales, fifty blankets in a bale. These classes of

goods have been baled in the manner described as long as I have been been in business.

C. G. STARK.

91 *Deposition of A. Weigell.*

THURSDAY AFTERNOON, *May 10th*, 1877—2.30 o'clock.

A. WEIGELL, being duly sworn as a witness on the part of the defendants, deposes and says, to questions propounded by Mr. STARK:

My name is A. Weigell, and am 29 years of age; am a dealer in feathers and bedding, in the city of Milwaukee; have been in that business in this city twelve years past.

Q. How has it been usual, during that time, to put up feathers for bedding, for transportation and for the trade.

(Objected to by Mr. Winkler as immaterial, and because no notice thereof has been given in the answer.)

A. In muslin and paper sacks; they are put up in sacks containing from one to ten pounds each, the sacks being made of paper or muslin. Several of these sacks are tied together in one bundle or bale for shipping. They are pressed together with the hands to make a compact bale or bundle; with the hands and weight of the body we can compress them sufficiently for the purposes of baling. They are put up in these small packages for the convenience of the customers; it enables dealers to retail the feathers without breaking the packages. I have known this method of packing feathers for fifteen years; during that time it has been common among feather dealers.

AUGUST WEIGELL.

(Here follows certificate of said notary public.)

92 And now at this same term, to wit, January term, 1879, and on the seventy-seventh day of said term, to wit, on the eighteenth day of April, A. D. 1879, the following proceedings were had, to wit:

Decree.

WENDELL R. KING
vs.
AUGUST GALLUN & ALBERT TROSTEL. } In equity.

This day came the parties by their counsel, and upon consideration of the pleadings and proofs and the arguments of counsel thereon, it is ordered, adjudged, and decreed by the court that this bill of complaint be, and hereby is, dismissed, and that the complainant pay the costs in this cause to be taxed, within ten days, and in default thereof that execution be issued for the same.

Appeal.

JUNE 2, 1879.

This day came the complainant by his solicitors and prayed an appeal to the Supreme Court of the United States, and filed his bond in the sum of two hundred and fifty dollars with Guido Pfister and Gottlob Bossert as sureties, conditioned to prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good; which bond is approved by the district judge, and is as follows:

93 *Appeal bond.*

Know all men by these presents, that we, Wendell R. King as principal, and Guido Pfister and Gottlob Bossert of Milwaukee, Wisconsin, as sureties, are held and firmly bound unto Albert Trostel and August Gallun in the full and just sum of two hundred and fifty dollars, to be paid to the said Albert Trostel and August Gallun or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals and dated this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between Wendell R. King, complainant, and Albert Trostel and August Gallun, defendants, a decree was rendered against the said complainant, and the said Wendell R. King, complainant, having taken an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Albert Trostel and August Gallun, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

94 Now, the condition of the above obligation is such that if the said Wendell R. King, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

WENDELL R. KING. [L. S.]
GUIDO PFISTER. [L. S.]
GOTTLOB BOSSERT. [L. S.]

Sealed and delivered in presence of—
FRED. C. WINKLER.
Approved by—

CHAS. E. DYER, *Judge.*

Whereupon it is ordered that said appeal be, and hereby is, allowed, and a citation issued.

95 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of the record and proceedings in the case of Wendell R. King vs. August Gallun, et al.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 25th day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

[SEAL.] EDWARD KURTZ, *Clerk.*

96 THE UNITED STATES OF AMERICA, *88:*

[SEAL.] To Albert Trostel and August Gallun, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal in the circuit court of the United States for the eastern district of Wisconsin, wherein Wendell R. King is appellant and you are appellees, to show cause, if any there be, why the decree passed against the said Wendell R. King should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, this second day of June, A. D. 1879, and of the Independence of the United States the 103rd.

CHAS. E. DYER,
Dis't Judge.

I accept service of the above citation this 24th day of July, A. D. 1879.
JOSHUA STARK,
Solicitor for Trostel & Gallun, Appellees.

(Indorsement on cover:) No. 95. Wendell R. King, appellant, vs. August Gallun and Albert Trostel. E. Wisconsin, C. C. U. S. Filed 17th October, 1879.

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109-99

OFFICE SUPREME COURT U. S.
FILED
OCT 8 1883
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WENDELL R. KING, *Appellant*,
vs.
AUGUST GALLUN AND ALBERT TROSTEL,
Appellees.

IN CHANCERY.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF AND ARGUMENT FOR APPELLANT.

L. L. COBURN,
Counsel for Appellant.

CHICAGO
JNO. C. MACGREGOR, PRINT. 66 ASHLAND BLOCK,
1883.

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IN CHANCERY.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF AND ARGUMENT FOR APPELLANT.

This is a bill for an injunction and damages for the infringement of Letters Patent No. 152,560, issued to W. R. King, June 20th, 1874, for Baled Plastering Hair. The bill is in the usual form, and there is no controversy in reference to the form of pleadings or the title to the patent. The answer alleges that the subject matter of the patent is not new, and defendants rely upon a general allegation in the answer, in the following language:

"These defendants further answering, say it is not true "as alleged in said bill, that the complainant is the first and "original inventor of the mode of putting up articles in "compressed bales, after the manner described in the speci- "fications and claim of the complainant annexed to his "said pretended Letters Patent; that said mode of baling "was not new or unknown at or before the issue of said "pretended Letters Patent, but on the contrary thereof, it

"had been in common use among manufacturers and mer-
"chants in the United States and Europe for more than ten
"years before that date, and during all that time had been
"and still is employed by manufacturers and dealers in the
"packing and baling of yarns, worsteds, battings, tobaccos
"and many other articles of merchandise, for greater con-
"venience of transportation, and subsequent separation in-
"to parcels of uniform quantity or weight.

(See p. 6, printed Transcript of Record.)

The defendants admit in their answer that they have baled and sold plastering hair put up in the same manner as described in the patent, and therefore there is no controversy in reference to infringement. (See p. 7.)

"These defendants admit that they have baled and sold plastering hair in bushel bags compressed together, substantially as is alleged in the bill, but they deny that in so doing they have injured the complainant or violated any legal right of the complainant, * * * * * * *"

It will be observed that the defendants do not set up in their answer any specific prior use in the form that is required by law for the purpose of defeating a patent for want of novelty. The alleged old knowledge and use is so general that it would only warrant the admission of evidence for the purpose of showing the court the state of the art with a view of limiting the scope of the patent.

NATURE OF THE INVENTION.

It is first important to determine just what Mr. King did. He made an important advance in the art or business of baling plastering hair. He says in his patent:

"I first place a bushel of hair into a paper sack loosely,
"or only so far packed as may be readily done by hand.

" Several of these one-bushel packages are then placed side " by side in a baling-press. I use for this purpose the " baling-press heretofore patented to me. They are thus " compressed forcibly together, so that the bale produced " will be a compact firm bale, occupying only about one- " fifth of the original bulk. The paper bags, which still en- " velop the individual bushels of the bale, keep said bushels " separate, and serve at the same time to protect the hair. " The bale, after being compressed, is tied in the usual way, " and is then in shape for transportation without further " covering, although it may be desirable, if the bale is to be " sent a long distance, to envelope it in a stout sacking " cover. Hair baled thus may be separated by the retail " dealer into bushel packages, each of which remains com- " pressed into a small size, and is in convenient condition " to handle." (See p. 24, Transcript of Record.)

This is a very concise description of just how Mr. King made his bales of plastering hair, and is a concise statement of the condition of the bale and character of the bale after it was made. Mr. King states with equal clearness how plastering hair was baled for transportation before he made his improvement. He says in his patent that hair was pressed into bales of convenient size for transportation, varying in amount as the order required, making a solid, compressed mass of plastering hair, which, when received by the retail dealer, was in such shape that he was obliged to dig the bale to pieces and weigh out a bushel or two bushels as the purchaser should require. That it was a disagreeable and difficult task, as the hair would be firmly matted together, filthy and unpleasant to handle. That when a bale was disintegrated and weighed for sale, it would be bulky and make an inconvenient package. That

this also occasioned waste to the dealer in handling. The claim of the patent is as follows:

"As an article of manufacture, the bale B of plasterers' "hair, consisting of several bundles, A, containing a bushel "each by weight, inclosed or incased in paper bags or sim- "ilar material, and united, compressed and secured to form "a package, substantially as specified." (See p. 25, Transcript of Record.)

This patent is limited to the mode of making a bale; Mr. King says in his patent: "I first place a bushel of hair "*into a paper sack loosely*, or only so far packed as may "be readily done by hand." In his claim he says, "con- "sisting of several bundles, A, containing a bushel each by "weight, *inclosed or incased in paper bags or similar ma-* "*terial*." It was clearly the intention of the patentee to place each bushel, (which he declares in his patent to be the unit of sale of plastering hair) in a bag. The hair when in a dry state ready for baling, was put into a paper bag until the bag contained just a bushel. It is well known that the number of pounds which lawfully constitute a bushel is not the same in all states, but the unit of sale is everwhere a bushel: so that in making the bale, the first step is to place the loose, dry hair in a paper bag until the bag contains a bushel, and then weigh into another bag another bushel, and so on; then take several of these bags each containing a bushel, and compress them in a press into a solid bale, making the bale about one-fifth the size (as he states in his specification), of the original bulk.

This is one of that class of patents where the process of making the article, enters into the article itself in such a way as to impart to the article new features. Each bushel of hair remains in the paper bag after the compression of the

bale in which it was placed loosely before compressed. The bale itself has the hair of which it is composed enclosed in paper sacks, so that it does not require an additional encasement of sacking or paper for shipment. The process of making this bale is new in the art of baling hair, and is also new in the art of making bales of any kind, and the novelty of the process of making the bale appears and gives shape and character to the bale itself, and the bale itself when made is different from any bale of baled hair that was ever before made, and is different from any bale of anything else that was ever made.

It is alleged in the answer that the invention is old because packages of merchandise and articles of trade of simple size or weight put up in packages or parcels conveniently adapted to the wants of the trade, have been commonly and usually packed together in compressed bales or cases by manufacturers and wholesale dealers. There is no attempt in the proof to show that bales of plastering hair were ever put up by this process; neither was it attempted to prove that anything else had ever been put up in the same manner described in Mr. King's patent. Carpetings, shoe threads and battings were never first put loosely into a paper bag, just a bushel in a bag, and then these bags placed in a press and pressed into a bale and then tied to fasten the bales securely.

It is not necessary for the Court to follow to the full extent the decisions made in *Penn. Salt Co. v. Thomas*, 5 Fisher, or *Dental Vulcanite Co. v. Gardner*, 4 Fisher, or *Baker v. Fairbanks*, MSS., N. D. of Ill. to sustain the King patent. Mr. King did something more than enclose an old article in an old package. Mr. King had enclosed an old article in an old package for many years by drying plaster-

ing hair and baling it in a large compact bale, having a bale of five bushels or any other number of bushels all compact in one mass, and enclosed in a burlap or paper for transportation. These bales were made the same as bales of hay, cotton &c. Here was an old and well known article compressed into an old and well known package. Mr. King was the first to bale plastering hair, and he invented a press with which he baled plastering hair.

(*King vs. The Louisville Cement Co.*, 6 Fish., 336.)

Mr. King built up an immense business extending throughout the entire country, consisting of buying of the tanner the hair as it came from the hides, taking it to his drying houses, drying it to put it in suitable condition for baling, and then baling it in solid compact bales suitable for shipment. He was the means of plastering hair becoming an article of merchandise that was transported throughout the country and kept in stock by dealers for sale, the same as plaster or cement. He conceived the idea of this new way of making a bale of hair, which gave to the bale novel features that overcame great objections that existed in handling the hair by dealers, and also in using the hair by the plasterer. When he conceived this new process of making the bale of hair and produced the new bale he could sell the hair for a much larger price. It is not necessary, therefore, for the court to go to the extent of holding that when the invention has so improved an art or manufacture as to revolutionize it by going into general use, that that fact alone makes it patentable. If Mr. King's improvement consisted solely of baling plastering hair for the first time, and in making the bales in the same way and of the same kind that had been made before, it would present a different question. But Mr. King took

the plastering hair and made his bales by a new process, different from what any other bales had been made either of the same or similar material, therefore Mr. King's new bale not only improved the art and revolutionized it by going into general use, but contained a new invention that entered both into the process of making the bale and gave to the bale special new features not possessed before by bales of plastering hair or of analagous material.

(See J. J. Montague's Deposition, p. 11, Transcript of Record.)

"A. Mr. King is carrying on the business putting plas-
"tering hair in that kind of bales extensively, and in nearly
"every large city of the Northern States.

"Q. 9. Do you consider plastering hair bales like Ex-
"hibits B and C to be any better or any saving in any way
"over any other kind of plastering hair packages that you
"have ever seen or handled upon the market? and if yea,
"state in what respects, giving your reasons for any opin-
"ion you may express.

"A. I consider them better on account of the economy
"in handling, also the convenience. I usually had to pay
"from eight to fifteen cents per bushel for it. For instance
"when country orders came in we could not send them any-
"thing else except baled hair. Their letters expressed so
"many bales of one bushel packages, and some of our city
"contractors would pay more for it on account of its econ-
"omy."

(See Archer's Deposition, p. 14.)

"Q. 13. Will you describe just how Mr. King has
"the bales like Exhibit B made; that is just the process
"gone through with by the men in making the bales?

"A. The hair is first dried, then put in paper sacks, "eight pounds each; five of those are put in a press with "two cords around and pressed into a bale; the cords are "then tied up so as to keep it in that shape."

DOES COMPLAINANT'S PATENT DESCRIBE AND CLAIM A PATENTABLE INVENTION?

The patent itself is *prima facie* evidence that it does describe and claim a patentable invention. I need not cite authorities upon this point. The defendant's answer does not set up any prior patent or printed publications, or prior use, giving names of users and place of use, and by whom to be proven in a manner to make it competent for the evidence to overcome the *prima facie* proof furnished by the patent itself. There is no evidence however to show that the process described in the patent or the article produced by that process was ever made or used before Mr. King practiced it and described and claimed it in his patent.

There is no controversy but that Mr. King made a different bale of plastering hair by a different process from what had been made before, and thereby overcame objections existing in all previous bales of plastering hair or other like material. His new bale was therefore an improvement in the art. It came clearly within the decision sustaining the Thompson invention for a "caustic alkali encased or enveloped in a tight metallic integument or metallic casing, as described."

In *Penn. Salt Co.* v. *Gugenheim*, the Court said: "The "testimony in the case clearly establishes the fact of the

"novelty and practical utility of Thompson's invention or "discovery, and his improvement in the art. It is therefore "the proper subject of a patent."

McKENNAN, J., in *Penn. Salt Mfg. Co.* v. *Thomas*, 5 Fisher, said "The effect was immensely to increase its "consumption."

Justice LIVINGSTON in *Langdon* v. *De Groot*, 1 Paine, 206 said: "It was rendered more portable and ready for use."

Webster on "Subject Matter," 30, said "The utility of "the change, as ascertained by its consequences, is the real "practical test of the sufficiency of an invention, and since "the one cannot exist without the other, the existense of "the one may be presumed in proof of the existense of the "other. Whenever the utility is proved to exist in any "great degree, a sufficiency of invention to support the "patent must be presumed."

DRUMMOND and DAVIS, Js., in *Tucker v. Fairbanks et. al.*, MSS. N. D. Ill., in sustaining the Tucker patent on a lard package, said: "In a commercial sense it has just "claims to be regarded as a new product."

The court below clearly erred in two respects. The most vital error is the following paragraph of the decision: "It is not necessary to decide in this case whether, taking "the whole package together, compressel in a baling press "which has been patented to him, as he states, it is such "an article as the patent law protects, because I do not "understand that the bale of the defendants, which is "claimed to be an infringement of the plaintiff's patent, has "been compressed in the same manner as the bale of the "plaintiff, and therefore, strictly speaking, it is not the

"bale described by the plaintiff." (4, Banning & Arden, 237.)

The admission in the answer directly refutes the utterances of the court above quoted. The defendants made precisely the same bale, by the same process that is described in the complainant's patent. They weighed the dry plastering hair into bushel paper sacks, and then compressed a certain number of those sacks solidly together in a press and bound them together, making a bale that could not be distinguished from those made by the complainant, only by the brand or name placed upon the outside of the package.

The court erred secondly, in finding that in order to sustain the complainant's patent, that he would have to go beyond the decision in the lard package of *Tucker vs. Fairbank, et al.* The court said in this case, (See 4 Banning & Arden, 238) "in a bill filed to protect a package which "was claimed to be a new article of manufacture for inclos- "ing lard. * * * * * * * * "It appeared in that case that the article produced a revo- "lution in the trade in lard, which was put up in such a "way as to stand all climates, and so that it could be "transported any distance without injury. With a good "deal of hesitation and doubt as to the correctness of the "ruling of this court in that case, one claim of the plain- "tiff's patent was sustained. * * * * * "I am not willing to go beyond that case nor to encourage "patents for such things as this, and to hold that nobody "else can take plasterers' hair and make it up into small "parcels and bind them together, no matter how, and to "say that any one who does this, infringes the patent of "the plaintiff."

The statement of the character of the patent is not correctly made by the court in this language: The patent describes just how the bale is made, and is limited to a particular process of making. It is not sufficient that a person simply put plastering hair into parcels and "bind them together, no matter how." The patent calls for taking plastering hair in a certain condition, and putting a specified quantity in a specified condition into bags, and then treating those packages in a specified manner, so that there is a particular kind of bale. This special process is a necessary part of the patent as well as a bale of a specified definite character.

This patent clearly comes within the decision of this Court in *Goodyear Dental Vulcanite Co, v. Davis*, (102, U. S., p. 224.) In that case the Court clearly and distinctly distinguished between the cases where the process enters into the product, or in other words, where "the invention is a product or manufacture made in a defined manner"—from the cases where the article which had never been put into small packages before was simply put into a small package of a character which would preserve and keep the article and enable its general distribution as an article of commerce. The following is the language of the Court: "We had occasion in *Smith v. Goodyear Dental Vulcanite Company "et al.* (93, U. S. 486) to construe this patent, and deter- "mine what the invention claimed and patented really was. "We held it to be 'a set of artificial teeth, as a new arti- "'cle of manufacture, consisting of a plate of hard rubber "'with teeth, or teeth and gums secured thereto in the "'manner described in the specification, by embedding the "'teeth and pins in a vulcanizable compound, so that it "'shall surround them, while it is in a soft state, before it is